TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 106.

H. HECKEL'S SUGAR REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

PENROSE A. McCLAIN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JULY 30, 1903.

(18,631.)

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SUPREME COURT OF THE UNITED STATES.

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SPRECKELS SUGAR REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

PENROSE A. McCLAIN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or of some of you, between Spreckels Sugar Refining Company, plaintiff, and Penrose A. McClain, defendant, a manifest error hath happened, to the great damage of the said Spreckels Sugar Refining Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the third circuit together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, at Philadelphia, the 5th day of June, in the year of our Lord one thousand nine hundred and one.

[SEAL.] SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed by the court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Penrose A. McClain, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of
2 the United States, eastern district of Pennsylvania, wherein Spreckels Sugar Refining Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, judge, holding circuit court of the United States this 5th day of June, in the year of our Lord one thousand nine hundred and one.

JOHN B. McPHERSON, *J.*

Service accepted.

J. WHITAKER THOMPSON,
Ass't U. S. Att'y, for Defendant.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE SPRECKELS SUGAR REFINING CO. *against* PENROSE A. MCCLAIN. } October Sessions, 1900. No. 3.

Statement of Plaintiff's Demand.

The plaintiff claims of the defendant the sum of $134,560.72, together with interest thereon as hereinafter set forth, all of which is justly due from the defendant to the plaintiff as follows:

The plaintiff is and was at all times hereinafter averred a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, engaged in the business of manufacturing sugar; and the defendant was at the various times hereinafter mentioned the collector of internal revenue for the first district of Pennsylvania. On or about the several dates hereinafter mentioned, the defendant by virtue of his office as collector of internal revenue and assuming to act under the authority of the laws and statutes of the United States and more especially under the authority of a statute of the United States entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, did demand of and by force and duress did collect from the plaintiff the several sums of money hereinafter specified for the respective periods hereinafter mentioned.

3 On October 11, 1898, for the period from June 14 to June 30, 1898	$1,378 60
On October 11, 1898, for the month of July, 1898	6,025 24
On October 11, 1898, for the month of August, 1898	6,439 71
On October 31, 1898, for the month of Sept. 1898	10,566 94
On December 6, 1898, for the month of October, 1898	6,338 84
On January 23, 1899, for the month of Nov., 1898	5,580 83
On January 23, 1899, for the month of Dec., 1898	5,210 49
On April 3, 1899, for the month of January, 1899	5,590 85
On May 2, 1899, for the month of February, 1899	4,540 06
On June 6, 1899, for the month of March, 1899	6,826 23
On July 1, 1899, for the month of April, 1899	6,718 88
On August 3, 1899, for the months of May and June, 1899	17,789 08
On September 2, 1899, for the month of July 1899	8,186 57
On October 5, 1899, for the month of August, 1899	7,251 97
On November 8, 1899, for the month of Sept., 1899	7,914 32
On December 2, 1899, for the month of October, 1899	6,420 83
On January 12, 1900, for the month of Nov., 1899	4,341 73
On February 9, 1900, for the month of Dec., 1899	5,814 08
On March 13, 1900, for the month of January, 1900	5,422 73
On April 23, 1900, for the month of February, 1900	6,202 74
Amounting in all to the sum of	$134,560 72

On or about the said several dates above mentioned, the plaintiff involuntarily, and under threat of distraint against its property in case of its refusal so to do, was compelled to and did pay to the defendant by reason of the said illegal demand and duress the said several sums of money above mentioned, protesting that it was not liable to pay the said tax at the several times or at any time, and that the said tax was erroneously, illegally and wrongfully assessed and collected.

The gross amount of the receipts of the plaintiff in its business on which the said tax was assessed and collected, as was shown by the monthly returns duly made to the collector of internal revenue, included receipts for the said period from June 14, 1898, to September 30, 1899, from other sources than that of its business of refining sugar, viz:

Receipts upon account of indebtedness due the plaintiff prior to the passage of the act	$204,912 51
Do. interest upon loans or indebtedness	28,924 35
Do. rent or wharfage	18,386 29
Do. stevedoring	143,146 45

4 The plaintiff is informed and believes that no part of its said receipts from other sources than its business of refining sugar was taxable under the provisions of the said act; that no tax upon any of its receipts was payable or collectible before the end of the year from the date of the passage of the said act; that the administration of the act makes arbitrary, unjust and illegal discrimination, founded on a pretended difference between the business of manufacturing and of refining sugar, between the plaintiff and other persons, firms, corporations and companies carrying on and doing the business of refining sugar; and that all the provisions of the act subjecting the plaintiff to pay the tax in question are in violation of the Constitution of the United States and void.

On or about the 10th day of February, 1899, the 16th day of November, 1899, and the 24th day of April, 1900, the plaintiff duly appealed in writing according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof to the Commissioner of Internal Revenue to remit, refund and pay back to the plaintiff the said several amounts of money erroneously and illegally collected as taxes as aforesaid, alleging the following reasons why the said appeals should be allowed and why the said sums of money should be refunded:

First. That the said law in so far as it assumes to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax is unconstitutional and void.

Second. That the said tax is a direct tax, which has not been apportioned among the several States as required by the Constitution of the United States, and is not uniform throughout the United States, and is invalid.

Third. That the plaintiff is and at all times has been engaged in the business of manufacturing sugar and not engaged in the busi-

ness of refining sugar; that it refines sugar only incidentally in the process of the manufacture thereof, and is, therefore, not liable for the payment of said tax.

Fourth. That by the provisions of the said law the said tax is payable annually at the end of each year and that the collection thereof monthly or for periods less than a year and prior to the expiration of the year is illegal, unauthorized and void.

Fifth. That the said tax has been assessed upon and collected from the gross receipts of the plaintiff, and that said gross receipts include receipts outside of those which come from the business of refining sugar; that the said gross receipts include receipts from sales of sugar made prior to the passage of the act, from interest on loans and indebtedness, from dividends upon stock owned by the plaintiff in other sugar refining companies, from wharfage collected by it upon wharves owned by it and receipts from other sources.

Sixth. Thereafter and on or about the 12th day of December, 1899, the said appeal for the refund or payment of the said sums of money was decided and disallowed by the said Commissioner and neither the said amount of money so collected as aforesaid nor any part thereof has been refunded to the plaintiff, but the whole thereof has been held and received by the defendant without right and to the use of the plaintiff; and the defendant has refused and still refuses to repay the same to the plaintiff.

The plaintiff further alleges that each and every one of the reasons mentioned in its appeal to the Commissioner of Internal Revenue and above set forth is a valid and lawful reason why the said several sums of money collected of the plaintiff as aforesaid should be refunded and repaid to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of one hundred and thirty-four thousand five hundred and sixty and 72/100 dollars ($134,560.72) with interest on $1,378.60 thereof from October 13, 1898, on $6,025.24 thereof from October 11, 1898, on $6,439.71 thereof from October 11, 1898, on $10,566.94 thereof from October 31, 1898, on $6,338.84 thereof from December 6, 1898, on $5,580.83 thereof from January 23, 1899, on $5,210.49 thereof from January 23, 1899, on $5,590.85 thereof from April 3, 1899, on $4,540.06 thereof from May 2, 1899, on $6,826.23 thereof from June 6, 1899, on $6,718.88 thereof from July 1, 1899, on $17,789.08 thereof from August 3, 1899, on $8,186.57 thereof from September 2, 1899, on $7,251.97 thereof from October 5, 1899, on $7,914.32 thereof from November 8, 1899, on $6,420.83 thereof from December 2, 1899, on $4,341.73 thereof from January 12, 1900, on $5,814.08 thereof from February 9, 1900, on $5,422.73 thereof from March 13, 1900, and on $6,202.74 thereof from April 23, 1900, together with the costs and expenses of this action.

JOHN G. JOHNSON,
Attorney for Plaintiff,
Per J. W. BAYARD.

PHILADELPHIA COUNTY, *ss:*

Joseph A. Ball being duly sworn says that he is the assistant treasurer of the corporation plaintiff and that the facts set forth in the foregoing statement as the basis of plaintiff's claim are true.

JOSEPH A. BALL.

6 Sworn to and subscribed before me this 20th day of September, 1900.

THOMAS S. GATES,
[SEAL.] *Notary Public.*

Endorsed: No. 3 October sessions, 1900, U. S. C. C. The Spreckels Segar Refining Co. *vs.* Penrose A. McClain. Statement of plaintiff's demand. Enter rule on above defendant to plead within fifteen days, or judgment *sec. reg.* John G. Johnson, att'y for plaintiff, per J. W. Bayard. To clerk U. S. C. C. John G. Johnson. Filed Sept. 21, 1900, Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 3.

SIR: The above named defendant pleads "not guilty."

JAMES B. HOLLAND,
United States Attorney.

To Samuel Bell, Esq., clerk, U. S. C. C. E. D. of Pa.

Endorsed: No. 3, Oct. S., 1900, United States circuit court. Spreckels Sugar Refining Co. *vs.* Penrose A. McClain. Plea. James B. Holland, U. S. att'y. Filed Oct. 3, 1900, Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 46.

7 *Statement of Plaintiff's Demand.*

Plaintiff claims of the defendant the sum of $32,049.60, together with interest thereon, as hereinafter set forth; all of which is justly due from the defendant to the plaintiff as follows:

The plaintiff is and was at all times hereinafter averred a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, engaged in the business of manufacturing sugar; and the defendant was at the various times hereinafter men-

tioned the collector of internal revenue for the first district of Pennsylvania. On or about the several dates hereinafter mentioned the defendant by virtue of his office as collector of internal revenue and assuming to act under the authority of the laws of a statute of the United States entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, did demand of and by force and duress did collect from the plaintiff the several sums of money hereinafter specified for the respective periods hereinafter mentioned:

On May 28, 1900, for the month of March, 1900.....	$5,415 41
On June 22, 1900, for the month of April, 1900.....	5,225 76
On August 4, 1900, for the month of May, 1900.....	5,566 51
On September 12, 1900, for the month of June, 1900.....	8,711 49
On September 12, 1900, for the month of July, 1900.....	7,130 43
Amounting in all to the sum of.....	$32,049 60

On or about the said several dates above mentioned, the plaintiff voluntarily, and under the threat of distraint against its property in case of its refusal so to do, was compelled to and did pay to the defendant by reason of the said illegal demand and duress the said several sums of money above mentioned, protesting that it was not liable to pay the said tax at the said several times or at any time, and that the said tax was erroneously, illegally and wrongfully assessed and collected.

The gross amount of the receipts of the plaintiff in its business on which the said tax was assessed and collected, as was shown by the monthly returns duly made to the collector of internal revenue, included receipts for the said period from March 1, 1900, to July 31, 1900, from other sources than that of its business of refining sugar, viz:

Receipts upon account of indebtedness due the plaintiff prior to the passage of the act.....	$517 92
8 Receipts upon account of interest upon loans or indebtedness	5,751 25
Receipts upon account of rent or wharfage.....	2,718 45
Receipts upon account of stevedoring.....	25,874 31

The plaintiff is informed and believes that no part of its said receipts from other sources than its business of refining sugar was taxable under the provisions of the said act; that no tax upon any of its receipts was payable or collectible before the end of the year from the date of the passage of the said act; that the administration of the act makes arbitrary, unjust and illegal discriminations, founded on a pretended difference between the business of manufacturing and of refining sugar, between the plaintiff and other persons, firms and corporations and companies carrying on and doing the business of refining sugar; and that all the provisions of the act subjecting the plaintiff to pay the tax in question are in violation of the Constitution of the United States and void.

On or about the 24th day of September, 1900, the plaintiff duly appealed in writing according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof to the Commissioner of Internal Revenue to remit, refund and pay back to the plaintiff the said several amounts of money erroneously and illegally collected as taxes as aforesaid, alleging the following as reasons why the said appeals should be allowed and why the said sums of money should be refunded:

First. That the said law in so far as it assumes to subject corporations or companies carrying on or doing the business of refining sugar to pay a special tax is unconstitutional and void.

Second. That the said tax is a direct tax, which has not been apportioned among the several States as required by the Constitution of the United States, and is not uniform throughout the United States, and is invalid.

Third. That the plaintiff is and at all times has been engaged in the business of manufacturing sugar and not engaged in the business of refining sugar; that it refines sugar only incidentally in the process of the manufacture thereof, and is, therefore, not liable for the payment of said tax.

Fourth. That by the provisions of the said law the said tax is payable annually at the end of each year and that the collection thereof monthly or for periods less than a year and prior to the expiration of the year is illegal, unauthorized and void.

Fifth. That the said tax has been assessed upon and collected from the gross receipts of the plaintiff, and that said gross receipts include receipts outside of those which come from the business of re-
9 fining sugar; that the said gross receipts include receipts from sales of sugar made prior to the passage of the act, from interest on loans and indebtedness, from dividends upon stock owned by the plaintiff in other sugar refining companies, from wharfage collected by it upon wharves owned by it and receipts from other sources.

Sixth. Thereafter and on or about the 12th day of December, 1900, the said appeal for the refund or payment of the said sums of money was decided and disallowed by the said Commissioner and neither the said amount of money so collected as aforesaid nor any part thereof has been refunded to the plaintiff, but the whole thereof has been held and received by the defendant without right and to the use of the plaintiff; and the defendant has refused and still refuses to repay the same to the plaintiff.

The plaintiff further alleges that each and every one of the reasons mentioned in its said appeal to the Commissioner of Internal Revenue and above set forth is a valid and lawful reason why the said several sums of money collected of the plaintiff as aforesaid should be refunded and repaid to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of thirty-two thousand and forty-nine dollars and sixty cents ($32,049.60) with interest upon $5,415.41 thereof from May 28,

1900; on $5,225.76 thereof from June 22, 1900; on $5,566.51 from August 4, 1900; and on $15,841.92 from the 12th day of September, 1900, together with the costs and expenses of this action.

JOHN G. JOHNSON,
Attorney for Plaintiff,
Per J. W. BAYARD.

PHILADELPHIA COUNTY, *ss:*

Joseph A. Ball, being duly sworn, says that he is the assistant treasurer of the corporation plaintiff and that the facts set forth in the foregoing statement as the basis of plaintiff's claim, are true.

JOSEPH A. BALL.

Sworn and subscribed to before me this 19th day of December, A. D., 1900.

[SEAL.] THOMAS S. GATES,
Notary Public.

Endorsed: No. 46, October sess., 1900, U. S. C. C. Spreckels Sugar Refining Co. *vs.* Penrose A. McClain, collector. Statement of plaintiff's demand. To clerk U. S. C. C. Enter a rule on defendant to plead in eight days or judgment *sec reg.*, Dec. 29, 1900. John G. Johnson, att'y for pl't'f, per J. W. Bayard. Filed Dec. 21, 1900, Samuel Bell, clerk.

10 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 46.

The above-named defendant pleads "not guilty."

JAMES B. HOLLAND,
United States Attorney, Att'y for Def't.

Endorsed: No. 46, Oct. S., 1900, United States circuit court. Spreckels Sugar Refining Co. *vs.* McClain. Plea. James B. Holland, U. S. att'y. Filed Dec. 31, 1900, Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Session, 1900, No. 3 and No. 46.

(Consolidated causes.)

Bill of Exceptions.

Be it remembered, that in the said sessions of October, 1900, came the plaintiff unto the said court and impleaded the said defendant

in two certain pleas of assumpsit, etc., in which the said plaintiff declared (*prout narr.*) and the said defendant pleaded (*prout* pleas) and thereupon issue was joined between them in each of said causes.

And afterwards, to wit, at the session of the said court held at Philadelphia in the district aforesaid before the Honorable John B. McPherson, judge of the said court, on the 16th day of April,
11 1901, the aforesaid issues between the said parties came on to be tried by a jury of the said district for that purpose duly empanelled (*prout* list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and thereupon it was agreed by and between the said parties that the said issues should be consolidated and tried as one cause; and the jurors of the jury aforesaid empanelled to try the said issues being also called came and were then and there in due manner chosen and sworn or affirmed to try the said causes; and upon the trial the counsel of the said plaintiff and of the said defendant offered evidence as follows:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Term, 1900, No. 3.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 46.

Before McPherson, J., and a jury.

PHILADELPHIA, PA., TUESDAY, *April* 16, 1901.

Appearances.

John G. Johnson and J. Wilson Bayard, Esqs., for plaintiff.
James B. Holland, Esq., U. S. district attorney, and J. Whitaker Thompson, Esq., assistant U. S. district attorney, for defendant.

JOSEPH A. BALL, having been duly sworn, was examined as follows:

By Mr. JOHNSON:

Q. What is your business?
A. Assistant treasurer of the Spreckels Sugar Refining Company.
12 Q. That company is engaged in what business?
A. Manufacturing and refining of sugar.
Q. Has it any property in the shape of wharves?
A. It has.
Q. Where are those wharves situated?

A. On the Delaware river.

Q. How many of them are there?

A. Three.

Q. Does it have any receipts in connection with those wharves?

A. It does.

Q. What is the general nature of its receipts; what is it called; what is the name of what it gets?

A. Wharfage.

Q. Tell us what you mean by wharfage, and how it gets receipts from that?

A. The vessel comes to the wharves and pays for the privilege of lying at the wharf for the time that it lies there.

Q. And those wharf charges, are they whatever the owner can get, or is there some general tariff of charges?

A. A general tariff of so much a ton.

Q. This company owns wharves, and it is in the receipt of moneys from the vessels which lie there and which pay wharfage charges thereon?

A. Yes, sir.

Q. You will give us presently a statement of the receipts since the war revenue act went into effect, which had been included in your returns to the Government, will you?

A. Yes, sir.

Q. Does it receive interest of any sort from investment or use of its money, and if so, what?

A. Yes, sir.

Q. Tell us how and what.

A. Interest for the use of its money, if it is deposited in some banks, and for investments which they may have. Receipts from that.

Q. That interest, has that anything to do with the sugar refining or its receipts from sugar refining?

A. No, sir.

Q. As manufacturers and refiners of sugars it has sold, since the war revenue act, a considerable amount of sugar, has it not?

A. Yes, sir.

13 Q. Those returns have been made from time to time to the Government, have they?

A. They have.

Q. And these returns were made monthly on all the receipts of the sugar refining company, the first being made October 5, 1898, was it not?

A. Yes, sir.

Q. And the first three were made in October, and thereafter pretty near monthly, were they not?

A. Yes, sir.

Q. Do you know whether the tax was paid at the end of the year or upon those returns monthly?

A. It was paid upon those returns monthly.

Q. Was that voluntarily made, or how?

A. Made by notice from the collector that if we did not pay it he would take steps to collect it.

Q. The amount was paid, then, under protest, the regular claims were made to the Commissioner of Internal Revenue every return, and were regularly denied by him, were they not?

A. Th-y were; yes, sir.

Q. There was another item that we call stevedoring, which you included in your return, was there not?

A. Yes, sir.

Q. I wish you would tell the jury what you mean by stevedoring. What were your receipts from stevedoring?

A. It is the business of the vessel discharging its own cargo. The vessel employs outside people to do that and in these cases the vessels employed the sugar refinery to do that discharging for them, they hiring the men and unloading the vessel, and the vessel paying for that work. These receipts were the receipts received from that work.

Q. The ships that come here and charter come under a charter, making it the duty of the ships to unload and do the stevedoring?

A. Yes, sir.

Q. And then you, in order to get the service done more to your satisfaction, charge the vessel for that stevedoring, do you, and get it done yourself?

A. We do.

Q. You then employ the regular stevedores at the port, who do the work for you, and pay them?

A. We have a stevedore who does our work, and we employ the men who are 'longshoremen, along the wharf, to do that work.

14 Q. The business of stevedoring is a special business known as stevedoring, is it not?

A. Yes, sir.

Q. If you did not agree with the vessel that you would do it for them for that charge, the vessel would have to hire its stevedores?

A. Yes, sir.

Q. You have here tabulated statements showing the period covered by each monthly return, the amount of your inclusions for indebtedness due before June 14, 1898, for interest, from rent and wharfage, from stevedoring, and from sales, have you not?

A. Yes, sir.

Q. Covering both these suits?

A. Yes, sir.

Q. And also of the tax paid, the dates of payment, and the gross receipts?

A. Yes, sir.

(The United States denies the right and claim to any return on any of these items for any reason, but is willing to accept the statement as correctly stating the receipts from the different sources, the dates of returns and the dates of payment.)

Q. Those are the statements, are they, in the two different suits (handing witness papers)?

A. Yes, sir.

Q. I will get you to make out and bring here to-morrow a statement, so that if necessary it may be included in the special verdict, first, your returns under the head of interest, with the amount of tax you paid thereon, the date thereof, and the interest on that from the date of payment up to to-morrow. Do the same thing with all the returns including all rent and wharfage, all stevedoring, and all indebtedness included upon transactions before the 14th of June, 1898, will you?

A. Yes, sir.

Q. And also make up a statement of the interest from the date when the same was paid monthly, down to the end of the fiscal year on the different payments. In each case until the first day of July of the year closing.

A. Yes, sir.

Q. There is another item of indebtedness due before June 14, 1898. Those amounts of receipts in the different months were included in your monthly returns, were they?

A. Yes, sir.

Q. Tell us what that item means.

15 A. That item includes all the business done previous to that date; receipts from business done previous to the 14th of June.

Q. In that claim is included no receipts from any business done subsequently to the 14th of June, 1898, but simply the collections of indebtedness which was due for transactions made before that date. Is that so?

A. That is what that claim covers.

Q. Your claim "sugar sold since June 14, 1898," includes your receipts from sugar sold by you, whether manufactured by you or refined by you, or manufactured and refined by you, does it?

A. Yes, sir.

Q. You sell, to some extent, sugar directly, but to a small extent, your company?

A. Yes, sir.

Q. And you have included all your receipts from sugar sold since the 14th of June, 1898, in the column headed "Sugar sold since June 14, 1898," have you?

A. Yes, sir.

Q. Then this Schedule A gives the period of receipts covered by each return, does it. Under the head of "Indebtedness due before June 14, 1898," it gives the amount included in each monthly return of collections from transactions antecedently to that time?

A. Yes, sir.

Q. The column headed "Interest" gives the amount included in your monthly returns of collections of interest accounts on your investments after June 14, 1898?

A. Yes, sir.

Q. The column headed "Rent and wharfage" gives the amount included in your monthly return of receipts from rent and wharfage as you described it?

A. Yes, sir.

Q. The stevedoring gives the amounts included in each monthly return from stevedoring, as you have described it, does it?

A. Yes, sir.

Q. The "Sugar sold since June 14, 1899," includes all your receipts as included in the returns from sugar sold in any way, whether manufactured or refined or both, since June 14, 1898?

A. Yes, sir.

Q. The "Gross receipts" means the amount of your return in total of all receipts from all sources in each month, upon which you were compelled to pay the tax, does it?

A. Yes, sir.

16 Q. And the column headed "Amount of tax paid" states the amount of tax upon each monthly return which you were made to pay, does it?

A. Yes, sir.

Q. And the "Dates of payment" means the times when you paid the respective sums?

A. Yes, sir.

Q. And the same remark applies to Schedule A, second sheet?

A. Yes, sir.

Cross-examination.

By Mr. THOMPSON:

Q. You import a large part of your raw sugar, do you not?

A. Large parts of it.

Q. Import that into the port of Philadelphia?

A. Largely.

By Mr. JOHNSON:

Q. They are foreign sugars?

A. Yes, sir.

By Mr. THOMPSON:

Q. You stated, did you not, when a vessel brings you a cargo of sugar, the vessel is liable for the stevedoring?

A. It is the business of the vessel to discharge her own cargo.

Q. And it is also the business of the vessel to procure its own wharf, is it not?

A. Yes, sir.

Q. The wharves which were erected by you, you rent to these vessels bringing in cargoes of sugar for your use in your refinery, do you not?

A. We use the sugar that those vessels bring; yes, sir.

Q. And you charge those vessels, which bring this cargo, wharfage?

A. We charge them wharfage.

Q. You also furnish them with stevedores for unloading their vessels, and charge them with that?

A. If we make a contract with the vessels to do the work; yes, sir, we charge them with stevedores.

Q. Most of these cargoes of sugar are sold to deliver on the wharf, are they not?

A. Very few of them.

17 Q. How are they sold?

A. A large portion of them are imported by ourselves.

Q. You purchase the cargo abroad, do you?

A. Most of the cargo.

Q. Do you charter the vessel?

A. We do not usually. Sometimes we do.

Q. These wharves which were erected by your company were they not erected for the purpose of unloading vessels which bring cargoes of sugar to you?

A. They were erected for the purpose of using them as wharves for any business that we may have, or see fit to use.

Q. The large part of the business that you have in connection with these wharves is unloading sugar which is consigned to you, is it not?

A. The larger part is.

Q. In fact, nearly all of it?

A. Yes, sir; nearly all of it.

Q. Is it not also the case that this stevedoring, which you claim is part of the gross receipts, is a charge made by you against the vessels which are bringing in cargoes of sugar for your refinery. You do not do any outside stevedoring business besides unloading vessels of sugar, do you?

A. Not outside of what we do at our own wharves.

Q. And not outside of cargoes of sugar which you import?

A. If a vessel was discharging at our wharf, we might not have imported the sugar, and yet might do the stevedoring.

By the COURT:

Q. The question is, do you do stevedoring for anything else but cargoes of sugar to you?

A. I should say not for anything except what is at our wharf.

Q. Do you do stevedoring for any other vessels except those carrying cargoes of sugar?

A. We have sometimes done stevedoring for goods outside of, for instance a steamer coming to our wharf might have other goods than sugar, and we have sometimes taken out those goods.

By Mr. THOMPSON:

Q. That is an exceptional case.

A. Particularly so. The most of the business is discharging of sugar.

Q. Of your own sugar?

18 A. Sugar coming to our wharf.
Q. Sugar destined for your refineries?
A. Yes, sir.
Q. These amounts of your gross receipts, which you claim are an account of interest, that is for interest on the corporate funds of the company, is it not, which you have invested in different ways, while you were not using them in your business or in the refining of sugar.
A. It is.
Q. Part of the funds which are incidental to and used in your business?
A. It is interest on any money that we may have, or any investments which we may have is included in that item.

Mr. JOHNSON: We offer these schedules in evidence.

By the COURT:

Q. Are your wharves used by any other vessels except those carrying sugar?
A. Very rarely. Once in a while some of the vessels, but mostly our vessels coming to us.

Mr. THOMPSON: I offer in evidence a certified copy of the charter of the Spreckels Sugar Refining Company. (*Prout* same.)
I also offer in evidence the monthly returns of gross receipts, and the tax lists on which they were assessed. (*Prout* same.)
Adjourned until Wednesday, April 17, 1901, at 10 a. m.

Second day, April 17, 1901.

Mr. Thompson offers in evidence an authenticated copy of the regulations of the Commissioner of the Treasury, under which these taxes were collected by the collector of internal revenue. (*Prout* same.)
Testimony closed.
The COURT: Gentlemen, the parties have agreed upon all the facts in this case, and put it in the form of a special verdict, so the court may afterwards pass upon the questions of law. You simply find this special verdict for the plaintiff, leaving the matter to the court for further consideration.
19 The following is a copy of the regulations of the Commissioner of Internal Revenue offered in evidence as aforesaid:

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *March* 12, 1901.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true and correct copy of the original in this department.
In witness whereof, I have hereunto set my hand and caused the

seal of the Treasury Department to be affixed, on the day and year first above written.

O. L. SPAULDING,
Acting Secretary of the Treasury.

L. J.
D. M. G.

[SEAL.]

Gross Receipts Taxable under Section 27, Act of June 13, 1898.

1899.

Department circular No. 93.

Internal revenue No. 540.

Treasury Department, office of the Commissioner of Internal Revenue.

WASHINGTON, D. C., *July* 7, 1899.

To collectors of internal revenue and others:

Section 27 of the act of June 13, 1898, provides:

That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

20 And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return.

Section 31 of the same act provides:

That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this act.

Section 3447 of the Revised Statutes of the United States provides:

Whenever the mode or time of assessing or collecting any tax

which is imposed is not provided for, the Commissioner of Internal Revenue may establish the same by regulation. He may also make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

(1.) Tax when due to be assessed.—The tax imposed by section 27, above quoted, being a special excise tax, the word "annually" as used in that section is held to apply to the special-tax year (commencing July 1), as defined in section 53 of the act of October 1, 1890.

Under the provisions of section 31, above quoted, it is also held that the tax thus imposed is assessable as soon as determined from the monthly returns required to be rendered.

(2.) Gross receipts.—As the tax so imposed is to be computed on "the gross amount of all receipts" in excess of $250,000, such gross receipts are held to include not only receipts from sales (or transportation), but all receipts, including rents, interest, dividends, storage charges, or commission, received from or in connection with the business enumerated in said section 27, during the period for which the required return is made. Deductions on account of cost of raw materials, customs duties, and operating expenses, heretofore claimed in certain cases, are under no circumstances permissible.

(3.) Returns, when and by whom to be made.—Every person, firm, corporation, or company liable to tax under said section 27 will hereafter render a return, on form 420 revised, of the gross
21 amount of all receipts each month, and not later than the fifteenth day of the following month. When the returns made include the receipts of any branch or "constituent" company engaged in the business of refining petroleum or sugar, or in operating any pipe line in the same or in another district, the name and location and the receipts of each such branch or constituent company should be stated in each return rendered.

The foregoing instructions will also apply to all such persons, firms, corporations, and companies where the gross receipts, during the period for which the return required by law is made, do not exceed the $250,000 specially exempted from tax. A monthly return will also be required during the temporary suspension of business. Where, however, the business carried on has been permanently discontinued, that fact should be noted on the last return rendered.

(4.) Change in name of firm, etc.—Changes in the name or style of any firm or company, or in the personnel of any firm or company which has become liable for the special tax imposed, will not be regarded, under the act named, as constituting a new firm or company. In all such cases, therefore, the exemption of $250,000 will be allowed only on the combined annual gross receipts of the firm or company as to which such changes occur.

(5.) Sugar produced and refined by continuous process.—Manufacturers who claim to refine only sugar of their own production, and to sell directly to consumers, will also be required to furnish a monthly sworn statement (to be attached to the prescribed return, form 420, revised), setting forth specifically that all sugar refined

by them during the month was produced and owned by them, and was refined on the same premises where produced and by a continuous process, and was sold directly to consumers. Persons, firms, corporations, and companies refining sugar not so produced, owned and sold, will be liable to the special *excise tax imposed*, and will be required to render a return on the prescribed form of the gross amount of all receipts.

(6.) Sugar or oil refined by agents, et -Every person, firm, corporation, or company owning or controlling any sugar or oil refinery, and, under any lease, contract, or agreement, receives, sells, or negotiates the sale of any sugar or oil refined on the premises so owned or controlled, or receives any profits accruing therefrom, will be regarded as a refiner, and, as such, will be required to make the prescribed return. Where the receipts or profits so realized, or any portion thereof, are included in the returns rendered by the person, firm, or company in whose name, or through whose agency, the business is so carried on, the fact should be noted on the returns as provided in instruction 3 of this circular.

22 The same instructions will apply to persons, firms, corporations, or companies owning or controlling any pipe line for the transportation of oil or other products.

(7.) Returns to be verified under oath.—In case of corporations, the returns made must in every instance be verified under oath by the president or chief officer, as required by law. This requirement does not admit of such verification by a cashier, secretary or treasurer, or by any officer other than that designated by law.

In case of a firm, the returns should be verified by a member thereof who should sign his name as such to each return rendered.

The required return being under oath, and containing statements based on personal knowledge, the same will not, in any case, be accepted if made by an agent or attorney of the person or officer required to make the same.

(8.) Original returns to be furnished with assessment list.—The original returns, form 420 revised, should in all cases be forwarded by collectors to the Commissioner of Internal Revenue with the lists, form 23, on which the assessment is to be made. Unless such returns are filed in duplicate, copies thereof should be retained in the collector's office.

(9.) Changes in the prescribed form not permitted.—No erasures or interlineations in the prescribed form should be made in any case.

Where exemptions, other than the $250,000 are claimed, or where the return rendered is made under protest, such exemptions or protest may be noted, either on the margin of the return or in a memorandum attached thereto.

Collectors will see that the foregoing instructions are carefully complied with in every case, and that all persons, firms, corporations, and companies in their respective districts, engaged in the business enumerated in section 27, are furnished with a copy of this circular, and with sufficient blanks (form 420 revised) on which to make the

required returns. Any failure to make the required return, or the making of any false or fraudulent return, should be at once reported to the Commissioner of Internal Revenue in order that proceedings may be instituted *for the enforcement of the penalties imposed* in such cases.

ROB'T WILLIAMS, JR.,
Acting Commissioner.

Approved:
L. J. GAGE, *Secretary.*

[SEAL.]

23 And thereupon, on the 17th day of April, 1901, the jury found and returned a special verdict in said cause, as follows:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 3.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 46.

Special Verdict.

The jury as a special verdict do find that during the period covered by the first suit to October sessions, 1900, No. 3, returns were made by the plaintiff to the defendant of its receipts as per Schedule A. hereto attached which is a summary of returns of Spreckels Sugar Refining Company covering its entire gross receipts from June 14, 1898. to March 1, 1900; that the column headed "Period covered by returns" shows the month for which the returns were made; that the column headed "Indebtedness due before June 14, 1898," covers the amounts included in the monthly returns from month to month of receipts by the company for sugars sold and delivered antecedently to June 14, 1898. No receipts for sugars sold subsequently to June 14, 1898, are included in said column. The column headed "Interest" gives the amounts included in said monthly returns of receipts during the month by the plaintiff derived from interest upon its investments of monies and property as explained by the testimony of Mr. Ball. The column headed "Rent and wharfage" gives the amounts included in said monthly returns from time to time of receipts during each month by the plaintiff as rent and wharfage of its property, said rent and wharfage being paid as is explained in the testimony of Mr. Ball. The column headed "Stevedoring" gives the receipt in each month included in its monthly returns by the corporation plaintiff from "stevedoring." Said receipts from stevedoring were had in

the way and manner explained in the testimony of Mr. Ball.

The column headed "Sugars sold since June 14, 1898,"
24 gives the amount of receipts in each month included in said monthly returns from all sales of sugar whether manufactured and refined, manufactured or refined or sold without manufacturing or refining by the corporation plaintiff since the 14th day of June, 1898. The column headed "Gross receipts" states the amounts of each monthly return made by the corporation plaintiff of its receipts in the respective months and includes all its receipts from every source. It is the aggregate of the returns under the five special heads just described. The column headed "Amount of tax paid" gives the amount paid at each monthly time of payment by the corporation plaintiff upon the total amount of its gross receipts as returned for the month in the preceding column. The column headed "Dates of payment" gives the date of payment of each of the amounts stated in the preceding column.

The Schedule A being "Summary of the returns of Spreckels Sugar Refining Company covering its entire gross receipts from March 1, 1900, to August 1, 1900" gives similar particulars concerning all the transactions covered by the second suit to October sessions, 1900, No. 46.

The jury find that the defendant, The Collector of Internal Revenue, compelled the corporation plaintiff to pay under protest at the respective times mentioned in the column headed "Dates of payment" the amount of the tax upon the monthly returns; that an appeal was duly made to the Commissioner of Internal Revenue; and that before each of the suits was brought the Commissioner of Internal Revenue as to the amounts comprised in said suits refused to make any allowance or return of the sums paid.

The jury further find that in the suit, October sessions, 1900, No. 3, the tax paid upon "indebtedness due before June 14, 1898" collected as above stated was $512.27; and that the interest upon said amount calculated from the time of payment to the present date is $77.42.

The jury further find that the amount of the tax paid upon returns of "interest" as above explained was $72.28; and that the interest on said payment calculated from the date of the respective payments thereof to the present time is $8.11.

The jury further find that the total amount of tax paid upon receipts from "rent and wharfage" was $45.97; and that the interest thereon calculated as above stated is $5.12.

The jury further find that the tax paid upon the receipts from "stevedoring" during the time covered by said suit was $357.83; and that the interest thereon calculated as aforesaid is $40.55.

The jury further find that the total amount of tax paid
25 upon all gross receipts during the period covered by said suit was $134,560.72 and that the interest thereon calculated as above stated is $14,855.93.

The jury find that the amount of the interest on the amounts paid monthly calculated from the date of the respective payments until

the close of the year ending first day of July, 1899, and first day of July, 1900, was $3,321.23.

The jury find that in the suit to October sessions, 1900, No. 40, the tax paid upon "indebtedness" due before June 14, 1898, collected as above stated, was $1.29; and that the interest upon said amount calculated from the time of the payment to the present date is $0.07.

The jury find that the amount of the tax paid upon returns of "interest," as above explained, was $14.37; and that the interest on said payment calculated from the date of the respective payments thereof to the present time is $0.58.

The jury further find that the total amount of tax paid upon receipts from "rent and wharfage" was $7.00; and that the interest thereon, calculated as above stated, is $0.28.

The jury further find that the tax paid upon the receipts from "stevedoring" during the time covered by said suit was $64.69; and that the interest thereon, calculated as aforesaid, is $2.70.

The jury further find that the total amount of tax paid upon all gross receipts during the period covered by said suit was $32,049.60 and that the interest thereon, calculated as above stated, is $1,354.23.

The jury find that the amount of the interest on the amounts paid monthly, calculated from the date of the respective payments until the close of the year ending first day of July, 1900, and first day of July, 1901, was $36.75.

The jury further find that the plaintiff, The Spreckels Sugar Refining Company, is a corporation incorporated under the laws of the State of Pennsylvania "for the purpose of refining sugar, which will involve the buying of raw material therefor, and selling the manufactured products, and of doing whatever else shall be incidental to the said business of refining."

If the court shall be of the opinion that the plaintiff has a cause of action against the defendant for the total amount of taxes paid on all gross receipts during the period covered by said suit, they find for the plaintiff in the respective suits for the amounts so found to have been paid, with interest thereon as above stated, otherwise they find for the defendant.

If the court shall be of the opinion that the plaintiff is not entitled to recover the total amount of the taxes paid upon the plaintiff's gross receipts as aforesaid, but is entitled to recover for the

SCHEDULE A.

Summary of Returns of Spreckels Sugar Refining Company Covering its Entire Gross Receipts from June 14, 1898, to March 1, 1900.

Period covered by return.	Indebtedness due before June 14, 1898.	Amounts received from—			Sugars sold since June 14, 1898.	Gross receipts.	Amount of tax paid.	Dates of payment.
		Interest.	Rent and wharfage.	Stevedoring.				
June 14 to June 30, 1898	$138,251 06	$12 50	$143 22	$2,168 85	$660,865 07	$801,440 70	$1,378 50	October 11, 1898.
July, 1898	32,905 97	595 82	1,677 27	14,460 09	2,610,456 47	2,660,095 62	6,025 24	October 11, 1898.
August, 1898	3,700 52	344 65	202 77	2,901 53	2,568,733 96	2,575,883 43	6,439 71	October 11, 1898.
September, 1898	18,930 91	229 48	717 30	5,058 27	4,201,841 02	4,226,776 98	10,566 94	October 31, 1898.
October, 1898	5,253 92	1,989 30	598 09	5,759 88	2,521,937 23	2,535,538 42	6,338 84	December 6, 1898.
November, 1898	590 94	347 32	549 87	5,958 62	2,224,886 86	2,232,332 71	5,580 83	January 23, 1899.
December, 1898	1,029 50	10,093 19	1,407 90	5,194 97	2,066,470 21	2,084,195 77	5,210 49	January 23, 1899.
January, 1899	424 00	1,881 93	962 05	8,587 00	2,224,484 45	2,236,339 43	5,590 85	April 3, 1899.
February, 1899	708 00	258 24	1,035 17	7,735 67	1,806,288 15	1,816,025 23	4,540 06	May 2, 1899.
March, 1899	241 26	256 40	1,442 51	12,201 06	2,716,352 23	2,730,493 46	6,826 23	June 6, 1899.
April, 1899	718 30	1,675 00	976 41	6,831 55	2,677,349 48	2,687,550 74	6,718 88	July 1, 1899.
May, 1899	97 00	801 52	1,424 03	9,174 53	3,297,595 69	3,309,092 77	8,272 73	August 3, 1899.
June, 1899	212 00	828 44	798 02	8,084 65	3,796,616 12	3,806,539 23	9,516 35	August 3, 1899.
July, 1899	317 00	119 68	977 73	7,520 79	3,515,692 85	3,524,628 05	8,186 57	September 2, 1899.
August, 1899	203 71	169 84	826 55	5,663 82	2,893,924 75	2,900,788 67	7,251 97	October 5, 1899.
September, 1899	.....	209 85	1,376 37	9,026 89	3,155,113 48	3,165,726 57	7,914 32	November 8, 1899.
October, 1899	.....	2,992 87	726 92	6,644 55	2,557,970 53	2,568,334 87	6,420 83	December 2, 1899.
November, 1899	.....	2,109 17	874 56	4,885 10	1,728,822 66	1,736,691 49	4,341 73	January 12, 1900.
December, 1899	.....	1,695 18	569 48	4,227 75	2,319,139 22	2,325,631 63	5,814 08	February 9, 1900.
January, 1900	323 93	37 34	444 89	4,835 16	2,163,452 22	2,169,093 54	5,422 73	March 13, 1900.
February, 1900	1,005 39	2,276 63	655 08	6,207 72	2,470,952 76	2,481,097 58	6,202 74	April 23, 1900.
Total	$204,912 51	$28,924 35	$18,386 29	$143,146 45	.....	.....	$134,560 72	

SCHEDULE A.

Summary of Returns of Spreckels Sugar Refining Company Covering its Entire Gross Receipts from March 1, 1900, to August 1, 1900.

Period covered by return.	Indebtedness due before June 14, 1898.	Interest.	Amounts received from—		Sugars sold since June 14, 1898.	Gross receipts	Amount of tax paid.	Dates of payment.
			Rent and wharfage.	Stevedoring.				
March, 1900	$517 92	$152 88	$3 5 48	$2,831 23	$2,162,298 33	$2,166,165 84	$5,415 41	May 28, 1900.
April, 1900	.....	903 04	690 66	6,247 94	2,082,462 63	2,090,304 27	5,225 76	June 22, 1900.
May, 1900	.....	1,453 99	923 68	6,472 38	2,217,753 54	2,226,603 59	5,566 51	August 4, 1900.
June, 1900	.....	917 69	88 87	2,472 16	3,481,120 75	3,484,599 47	8,711 49	September 12, 1900.
July, 1900	.....	2,323 65	649 76	7,850 60	3,091,349 45	3,102,173 46	7,130 43	September 12, 1900.
Total	$517 92	$5,751 25	$2,718 45	$25,874 31	.....	.....	$32,049 60	

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28 amount paid upon any of the items included in its returns of gross receipts as above set forth, they find for the plaintiff for the amounts so found to have been paid, with interest as aforesaid, otherwise they find for the defendant.

If the court shall be of the opinion that the plaintiff has cause of action against the defendant for interest upon the amounts paid monthly as above set forth, they find for the plaintiff for the said amounts of interest, otherwise they find for the defendant.

And thereupon, on the 18th day of May, 1901, the said judge filed an opinion and judgment in said cause as follows:

The parties to this action have agreed upon a special verdict of which the following are the material portions:

"The jury as a special verdict do find that during the period covered by the first suit to October sessions, 1900, No. 3, returns were made by the plaintiff to the defendant of its receipts as per Schedule A hereto attached, which is a summary of returns of Spreckels Sugar Refining Company covering its entire gross receipts from June 14, 1898, to March 1, 1900; that the column headed "Period covered by returns" shows the month for which the returns were made; that the column headed "Indebtedness due before June 14, 1898" covers the amounts included in the monthly returns from month to month of receipts by the company for sugars sold and delivered antecedently to June 14, 1898. No receipts from sugars sold subsequently to June 14, 1898, are included in said column. The column headed "Interest" gives the amounts included in said monthly returns of receipts during the month by the plaintiff derived from interest upon its investments of moneys and property as explained by the testimony of Mr. Ball. The column headed "Rent and wharfage" gives the amount included in said monthly returns from time to time of receipts during each month by the plaintiff as rent and wharfage of its property, said rent and wharfage being paid as is explained in the testimony of Mr. Ball. The column headed "Stevedoring" gives the receipt in each month included in its monthly returns by the corporation plaintiff from "stevedoring." Said receipts from stevedoring were had in the way and manner explained in the testimony of Mr. Ball. The column headed "Sugars sold since June 14, 1898" gives the amount of receipts in each month included in said monthly returns from all sales of sugar whether manufactured and refined, manufactured or refined, or sold without manufacturing or refining, by the corporation plaintiff since the 14th day of June, 1898. The column headed "Gross receipts" states the amounts of each monthly return made by the corporation plaintiff of its receipts in the respective months and includes all its receipts from every source. It is the aggregate of the returns under the five special
29 heads just described. The column headed "Amount of tax paid" gives the amount paid at each monthly time of payment by the corporation plaintiff upon the total amount of its gross receipts as returned for the month in the preceding column. The column headed "Dates of payment" gives the date of payment of each of the amounts stated in the preceding column.

"The Schedule A being "Summary of returns of Spreckels Sugar Refining Company covering its entire gross receipts from March 1, 1900, to August 1, 1900" gives similar particulars concerning all the transactions covered by the second suit to October sessions, 1900, No. 40.

"The jury find that the defendant, The Collector of Internal Revenue, compelled the corporation plaintiff to pay under protest at the respective times mentioned in the column headed "Dates of payment" the amount of the tax upon the monthly returns; that an appeal was *only* made to the Commissioner of Internal Revenue; and that before each of the suits was brought, the Commissioner of Internal Revenue as to the amounts comprised in said suits refused to make any allowance or return of the sums paid. * * *

"The jury find further that the plaintiff, The Spreckels Sugar Refining Company, is a corporation incorporated under the laws of the State of Pennsylvania for the purpose "of refining sugar, which will involve the buying of raw material therefor, and selling the manufactured products, and of doing whatever else shall be incidental to the said business of refining."

"If the court shall be of the opinion that the plaintiff has a cause of action against the defendant for the total amount of taxes paid on all gross receipts during the period covered by said suit, they find for the plaintiff in the respective suits for the amounts so found to have been paid, with interest thereon as above stated, otherwise they find for the defendant.

"If the court shall be of opinion that the plaintiff is not entitled to recover the total amount of the taxes paid upon the plaintiff's gross receipts as aforesaid, but is entitled to recover for the amount paid upon any of the items included in its returns of gross receipts, as above set forth, they find for the plaintiff for the amounts so found to have been paid, with interest as aforesaid, otherwise they find for the defendant.

"If the court shall be of the opinion that the plaintiff has a cause of action against the defendant for interest upon the amounts paid monthly, as above set forth, they find for the plaintiff for the said amounts of interest, otherwise they find for the defendant.

The principal question raised by this case is the constitutionality of section 27 of the war revenue act of June 13, 1898, so far as
30 sugar refiners are concerned. The plaintiff contends that the tax imposed by the section is a direct tax, specifically laid upon the gross receipts of refiners, and is invalid because it is not apportioned in accordance with article 1, section 9, clause 4, of the Federal Constitution; while the Government contends that the tax is valid because it is not a direct tax, but an excise laid upon the business of refining and not upon the receipts themselves arising from the business. The present suit is a test case, destined for the Supreme Court of the United States, and therefore I shall not undertake the superfluous and somewhat difficult task of discussing the numerous decisions which have more or less bearing on the controversy. A question of taxation is peculiarly a question for a court of

last resort; for the discussion of the subject belong- essentially to a region of fiction and construction, and the final decision is often determined by considerations of policy alone. Every tax, in the final an-lysis, is an exaction from an individual, or a corporate, taxpayer; but in many an instance the discussion stops short of this point, and treats the tax as if it were to be satisfied by the inanimate object, or the immaterial franchise, in respect of which it has been imposed. Frequent examples of such use of words may easily be found, and this method of speech has led, I think, to much confusion and discord among the cases, so that it is not hard to find ample authority on almost any phase of a controversy concerning taxation. In the case now before the court, it would not be difficult to choose from the decisions that have been cited by the respective parties, sufficient authority to support either conclusion, and, in this state of the question, I believe my duty to be fully performed when I sustain the constitutionality of the section without discussion, on the ground that I have not been clearly satisfied that it ought to be stricken down.

Several questions remain to be decided, upon which I shall express my opinion briefly. First: Was the collector justified in demanding monthly payments? I answer this question in the affirmative. The tax is no doubt an annual tax in the sense that it is to be paid each year; and, if provision for its assessment and collection had been made by the act, such provision would have been obligatory both upon the Government and upon the refiner. But, as no such provision is to be found, and as section 31 expressly declares, "That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act," it seems to follow, that by virtue of this section all the provisions of section 3447 of the Revised Statutes become applicable. By the last named section, it is declared that "whenever the mode or time of assessing or collecting any tax which is imposed is not pro-
31 vided for, the Commissioner of Internal Revenue may establish the same by regulation." Such a regulation was made by the Commissioner on July 7, 1899, by a circular, to be found in Treasury Decisions No. 21,367, containing the following instruction to collectors of internal revenue, "Under the provisions of section 31, above quoted, it is also held that the tax imposed is assessable as soon as determined from the monthly returns required to be rendered." At least after July 7, 1899, therefore, the monthly assessments were expressly warranted by law. Before that date, I think that the act itself made the assessment, under the rule laid down in Savings Bank *vs.* United States, 19 Wall., 240, and in King *vs.* United States, 99 U. S., 233. In the former case Mr. Justice Strong used the following language: "Nor is there anything in the objection that the taxes for which judgment has been recovered in this case had not been assessed. No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed,

and the amount of the tax required of each individual. It may be made by designated officers, or by the law itself. In the present case, the statute required every savings bank to pay a tax of five per cent. on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor." This language is directly applicable to the present case, and whatever difficulty might have existed in applying the rule before July 9, 1899, to a case where the gross receipts did not at once appear from the monthly returns to exceed $250,000, no such difficulty is found in the case now under consideration, for the first return made by the plaintiff showed that the gross receipts for sugar sold since June 13, 1898—the date of the act—amounted in the last two weeks of that month to $660,865.07.

The second question is this: Was the plaintiff taxable in respect of money received after the passage of the act, although such money had been earned previously thereto. I think the answer must be, No. If the tax had been directly upon the plaintiff's gross receipts, the Government's position upon this point would be stronger for it might then be argued with a good deal of force, that the act taxed *all* gross receipts in excess of $250,000, and took no account of the sources from which they were derived, except to declare that they must be received in the business of refining. But, as the Government takes the position, that the tax is an excise upon the occupation of refining, measured by the annual receipts of the business, I think the inevitable inference is, that the business should be valued, either from the time the act was passed, or from the 1st of July succeeding—that being the beginning of the special tax year—
32 and that receipts which were the product of a preceding business activity should not be taken into account.

The third question concerns the taxability of interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income producing securities. This interest, I think, was properly included by the collector in determining the annual value of the business. It was corporate property, presumably used for corporate purposes, and was as much engaged in the business of refining as the capital invested in machinery or raw materials.

Similar observations may be made concerning the fourth question, namely; whether the receipts from capital invested in wharves was properly included. Scarcely any vessels lie at these wharves except the vessels that bring raw sugar to the plaintiff, and the wharves are used for the convenience and greater profit of the corporate enterprise. The money paid by the vessels for wharfage is, I think, a receipt of the business. The receipts from stevedoring, however, I think were not properly included. It is the duty of a vessel bringing sugar to the plaintiff, to unload the cargo; and, if this duty should be actually discharged by the vessel, the cost of stevedoring would be paid from another source than from the plaintiff's treasury. If, however, the plaintiff chooses to unload the cargo and to

charge the usual price for the work, this labor, it seems to me, is not done in the course of its business as a refiner, but merely in discharge of the vessel's obligation to unload at its own expense.

In accordance with the above opinion, the plaintiff is entitled to judgment as follows:

1. For tax paid upon $204,912.51 and $517.92 of receipts on account of business done before the passage of the act, and

2. For tax paid upon $143,146.45 and $25,874.31 of receipts for stevedoring; with the proper interest upon both sums.

The total amount which the plaintiff is entitled to recover is, therefore, $1,056.82, for which judgment will be entered.

(Exception to the plaintiff, and also to the defendant.)

And thereupon judgment was entered accordingly.

And thereupon the counsel for the said plaintiff excepted to the opinion and judgment of the said judge upon the following grounds:

1. Because the learned judge decided that section 27 of the act of Congress, approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," was valid and constitutional.

2. Because the learned judge decided that the plaintiff was liable to taxation under the provision of the said section of said act.

33 3. Because the learned judge decided that under the provisions of said act plaintiff was bound to pay the tax therein levied upon its gross receipts monthly as returns were made and rendered by it thereunder.

4. Because the learned judge did not decide that the plaintiff was only required to pay said tax under the provisions of said section of said act annually.

5. Because the learned judge decided that the plaintiff was liable under said section of said act to taxation, upon interest received by plaintiff upon its investments.

6. Because the learned judge decided that the plaintiff was liable to taxation under the provisions of said section of said act upon its receipts from rent and wharfage.

7. Because the learned judge did not decide that the plaintiff was in no event liable under the provisions of said section of said act to taxation upon its receipts from any other source than the sales made since the 13th day of June, 1898, of sugar by it manufactured.

And inasmuch as said opinion and judgment so excepted to do not appear upon the record, the said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion and judgment of the said court and request the seal of the judge aforesaid to be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, this 29th day of May, 1901.

[SEAL.] JOHN B. McPHERSON, *Judge.*

Endorsed: Nos. 3 and 46, Oct. sessions, 1900, U. S. C. C. Spreckels Sugar Refining Co. *vs.* Penrose A. McClain. Bill of exceptions for plaintiff. Agreed to. J. Whitaker Thompson, ass't U. S. att'y. John G. Johnson, for plaintiff. Filed May 29, 1901, Samuel Bell, clerk.

34 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 3.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN. } October Sessions, 1900, No. 46.

(Consolidated causes.)

Specifications of Error.

1. The learned judge erred in deciding that section 27 of the act of Congress, approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," is valid and constitutional.

2. The learned judge erred in deciding that the plaintiff was liable to taxation under the provisions of the said section of said act.

3. The learned judge erred in deciding that under the provisions of said act plaintiff was bound to pay the tax therein levied upon its gross receipts monthly as returns were made and rendered by it thereunder.

4. The learned judge erred in not deciding that the plaintiff was only required to pay said tax under the provisions of said section of said act annually.

5. The learned judge erred in deciding that the plaintiff was liable under said section of said act to taxation upon interest received by plaintiff upon its investments.

6. The learned judge erred in deciding that the plaintiff was liable to taxation under the provisions of said section of said act upon its receipts from rent and wharfage.

7. The learned judge erred in not deciding that the plaintiff was in no event liable under the provisions of said section of said
35 act to taxation upon its receipts from any other source than the sales made since the 13th day of June, 1898, of sugar by it manufactured.

JOHN G. JOHNSON,
Per J. W. BAYARD,
For Plaintiff in Error.

May 28, 1901.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO.
vs.
PENROSE A. McCLAIN. } October Sessions, 1900, No. 3.

SPRECKELS SUGAR REFINING CO.
vs.
PENROSE A. McCLAIN. } October Sessions, 1900, No. 46.

(Consolidated causes.)

Petition for Writ of Error.

Spreckels Sugar Refining Company, plaintiff in the above entitled causes, being aggrieved by the final judgment made and entered by the court in the above entitled causes on the 18th day of May, A. D. 1901, whereby it is adjudged that the plaintiff shall recover therein only the sum of one thousand and fifty-six and 82/100 dollars, with interest from April 17, 1901, and that the 27th section of the act of Congress, approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes" is constitutional, comes now by its attorney, John G. Johnson, and petitions the court for an order allowing the said plaintiff to prosecute a writ of error from the said judgment to the circuit court of appeals of the United States for the third circuit in accordance with the laws of the United States in that behalf made and pro-
36 vided; and also that an order be made fixing the amount of security which plaintiff shall furnish upon such writ of error and that upon giving such security all further proceedings in this court shall be stayed until the determination of said writ of error by the said United States circuit court of appeals for the third circuit.

And your petitioner will ever pray.

JOHN G. JOHNSON,
Attorney for Petitioner.

May 28, 1901.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO.
vs.
PENROSE A. McCLAIN. } October Sessions, 1900, No. 3.

SPRECKELS SUGAR REFINING CO.
vs.
PENROSE A. McCLAIN. } October Sessions, 1900, No. 46.

Order.

And now, May 29, 1901, on motion of John G. Johnson for plaintiff, it is ordered that the writ of error to the United States circuit

court of appeals for the third circuit from the final judgment heretofore filed and entered in the above entitled cause, be and the same is hereby allowed and that a certified transcript of the record and of the proceedings herein be forthwith transmitted to the said court.

It is further ordered that the bond for damages and costs on said appeal be and the same is hereby fixed at five hundred dollars.

BY THE COURT.

37 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. McCLAIN. } October Sessions, 1900, No. 3.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. McCLAIN. } October Sessions, 1900, No. 46.

Stipulation to Consolidate Causes.

And now, April 16, 1901, it is agreed by and between the counsel for the plaintiff and defendant respectively in the above entitled causes, that the same shall be consolidated and tried as one cause.

JOHN G. JOHNSON,
Attorney for Plaintiff.
JAMES B. HOLLAND,
Attorney for Defendant.

Endorsed: Nos. 3 and 46, October sess., 1900, U. S. C. C. Spreckels Sugar Refining Company *vs.* Penrose A. McClain. Stipulation to consolidate causes. John G. Johnson, James B. Holland. Filed May 29, 1901, Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. McCLAIN. } October Sessions, 1900, No. 3.

38 SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. McCLAIN. } October Sessions, 1900, No. 46.

(Consolidated causes.)

Stipulation as to the Record on Writ of Error.

And now, May 28, 1901, it is agreed by and between the counsel for the parties hereto, and the clerk of the circuit court is hereby directed that in making up the record upon any writ of error which

may be taken in these causes by either of the parties hereto, such record shall consist of the following described papers:

1. Statement of claim and plea in the suit to October sessions, 1900, No. 3.

2. Statement of claim and plea in the suit to October sessions, 1900, No. 46.

3. Bill of exceptions filed by the party taking such writ of error.

4. Specifications of error by the party taking such writ of error.

And no other papers.

JOHN G. JOHNSON,
Attorney for Plaintiff.
JAMES B. HOLLAND,
Attorney for Defendant.

Endorsed: Nos. 3 and 46, October sess., 1900, U. S. C. C. Spreckels Sugar Refining Company *vs.* Penrose A. McClain. Stipulation as to record on writ of error. John G. Johnson, James B. Holland. Filed May 29, 1901, Samuel Bell, clerk, H. R.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN.	October Sessions, 1900, No. 3.
39 SPRECKELS SUGAR REFINING CO. *vs.* PENROSE A. MCCLAIN.	October Sessions, 1900, No. 46.

(Consolidated causes.)

Know all men by these presents that we, Spreckels Sugar Refining Company as principal and Joseph A. Ball as surety, are held and firmly bound unto Penrose A. McClain in the full and just sum of five hundred dollars ($500) to be paid to the said Penrose A. McClain, his certain attorney, executors, administrators or assigns: To which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this third day of June, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the circuit court of the United States for the eastern district of Pennsylvania, in two certain suits dependent in said court between Spreckels Sugar Refining Company and Penrose A. McClain to October sessions, 1900, No. 3 and No. 46, a judgment was rendered in favor of the plaintiff on the 18th day of May, 1901, in the sum only of one thousand and fifty-six and 82/100 dollars, with interest from April 17, 1901.

And whereas, the said plaintiff being dissatisfied with the said

judgment and alleging that greater sums are due it in said suits than are awarded by said judgment to it, has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the said suits and a citation filed to the said Penrose A. McClain citing and admonishing him to be and appear at the session of the United States circuit court of appeals for the third circuit to be holden at the city of Philadelphia in said circuit within thirty days.

Now the condition of the above obligation is such, that if the said Spreckels Sugar Refining Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] SPRECKELS SUGAR REFINING COMPANY,
By W. O. HAVEMEYER, *President.*

40 Attest:
[SEAL.] W. W. FRAZIER, *Secretary.*
JOSEPH A. BALL, *Surety.*

Sealed and delivered in the presence of—
HENRY C. MOTT.
G. W. BAILEY.

Endorsed: Nos. 3 and 46, October sessions, 1900, U. S. C. C. Spreckels Sugar Refining Company *vs.* McClain. Bond on writ of error. The within bond is satisfactory to defendant. J. Whitaker Thompson, ass't U. S. attorney for defendant.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the cases of Spreckels Sugar Refining Co. *vs.* Penrose A. McClain, Nos. 3 and 46, Oct. sess., 1900, as per stipulations of counsel, copies of which are hereto annexed, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of June, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

41 And afterwards to wit, on the fourth day of October A. D. 1901, this cause being called for argument on the transcipt of record from the circuit court of the United States for the eastern

district of Pennsylvania before Hon. M. W. Acheson, Hon. George M. Dallas and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit: on the thirteenth day of January A. D. 1902, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:—

42 In the United States Circuit Court of Appeals for the Third Circuit.

SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
v.
PENROSE A. MCCLAIN, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

DALLAS, *J.*:

The plaintiff below (and here) is a corporation erected under the law of Pennsylvania, for the purpose "of refining sugar, which will involve the buying of the raw material therefor and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining." The defendant is the collector of internal revenue for the first district of Pennsylvania. The action was brought to recover certain sums of money which he had exacted under section 27 of the war revenue act of 1898, and which the plaintiff had paid under protest. That section is as follows:

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed $250,000, shall be subject to pay annually a special excise tax equivalent to one quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of $250,000. And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business."

The parties agreed upon a special verdict, the material portions of which are set out in the opinion of the court below and need not be here repeated.

1. The first and most important question raised by the assignment of errors is whether the above section is unconstitutional.
43 This question, however, the learned judge of the circuit court declined to discuss, because "the present suit is a test case, destined for the Supreme Court of the United States;" and for the same reason, we, also, refrain from discussing it, and deem it expedient to merely state our affirmance of the constitutionality of the section, upon the ground that the presumption in favor of its validity has not been clearly confuted.

2. The use which the plaintiff really made of its wharves was in "carrying on or doing the business of * * * refining sugar." They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were its receipts, and as such they were properly comprised in the assessment. Adams Express Co. *v.* Ohio State Auditor, 165 U. S., 194.

3. The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income producing securities, was also rightly included. The special verdict states that it was "interest upon its investments of moneys and property as explained by the testimony of Mr. Ball," and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining, but the question for our decision is, not whether this interest was derived from the refining of sugar, which of course it was not, but whether or not it was received in the *business* of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation,
44 however occasioned, must have been its gain. Except in connection with and as incidental to that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business.

4. The learned judge in deciding that the collector had been justified in demanding monthly payments, said: "The tax is no doubt an annual tax in the sense that it is paid each year, and if provision for its assessment and collection had been made by the act, such provision would have been obligatory, both upon the Government and upon the refiner." But he was of opinion that the act contained no such provisions, and that therefore the regulation of the Commissioner of Internal Revenue directing its monthly assessment and collection was authorized by section 3447 of the Revised Statutes. We are unable to concur in the construction which was thus

given to section 27 of the act of June 13, 1898. It is of course a possible one, but its correctness is, at least, so questionable as to render it inadmissible to impose a duty upon a citizen. Hartranft *v.* Weigmann, 121 U. S., 609; U. S. *v.* Isham, 17 Wall., 496. But aside from this consideration, the meaning attributed by the court below to the phrase "shall be subject to pay annually," is not, we think, its natural meaning. The requirement, as directly and plainly expressed, is for payment annually and upon annual receipts; and this being so, there is, in our opinion, no warrant for inferring from the quite distinct provision for monthly returns, that it was intended that monthly payments might also be demanded, and upon monthly receipts. The tax, moreover, is only on gross annual receipts in excess of $250,000, and it cannot be supposed to have been contemplated that any person or company whose first return, as in the present instance, exhibited gross receipts exceeding that
45 amount, would be subject to a different rule respecting the time of payment from that which would apply to others, whose gross annual receipts might be shown to be greater than $250,000, only by a later return. We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration, and except by necessity, no such interpretation could be justified.

Solely upon the ground that the circuit court erred in holding that the plaintiff was required to pay the tax in question otherwise than annually, its judgment is reversed, and the cause is remanded to that court for further proceedings to be there taken in conformity with this opinion.

Filed January 13, 1902.

46 SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
v.
PENROSE A. MCCLAIN, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

GRAY, *J.*:

Agreeing with the opinion of the court, as written in paragraphs 1, 2 and 4, I am compelled to dissent from that expressed in paragraph 3, to the effect that the interest received by the plaintiff in error, upon its deposits in bank, and as dividends from investments in shares and other securities, should be included in the amount of gross receipts in its business of sugar refining, returned for assessment and taxation.

Keeping in mind the well settled rule, that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds, are in any proper sense receipts in the business of sugar refining. The very term "*gorss*

receipts" in "the business," would seem to exclude all such receipts as the interest upon investments here referred to.

Filed, January 13. 1902.

47 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1901.

SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
vs.
PENROSE A. MCCLAIN, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error. } No. 17.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby reversed.

And it is further ordered that this cause be remanded to the said circuit court for further proceedings in conformity with the opinion of this court.

Philadelphia January 14. 1902.

GEO. M. DALLAS,
Circuit Judge.

48 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1901.

SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
vs.
PENROSE A. MCCLAIN, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error. } No. 17.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

And now to wit: this 14 day of February A. D. 1902, it is ordered that mandate issue to the said circuit court of the United States for the eastern district of Pennsylvania in accordance with the opinion and judgment of this court in said cause.

GEO. M. DALLAS,
Circuit Judge.

49 UNITED STATES OF AMERICA, *ss:*

[Seal United States Circuit Court of Appeals, Third Circuit.]

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between Spreckels Sugar Refining Company, plaintiff in error, against Penrose A. McClain, collector of internal revenue for the first district of Pennsylvania, defendant in error, wherein the judgment of the said circuit court entered in said cause is in the following words, viz:—

"In accordance with the opinion of said court, the plaintiff is entitled to judgment as follows:

1. For tax paid upon $204,912.51, and $517.92 of receipts on account of business done before the passage of the act, and

2. For tax paid upon $143,146.45 and $25,874.31 of receipts for stevedoring; with the proper interest upon both sums.

The total amount which the plaintiff is entitled to recover is therefore $1,056.82, for which judgment will be entered and there-

upon judgment was entered accordingly,

50 as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

51 And whereas, in the present term of September, in the year of our Lord one thousand nine hundred and one, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby reversed.

And it is further ordered that this cause be remanded to the said circuit court for further proceedings in conformity with the opinion of this court.

Philadelphia, January 14, 1902.

52 You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 14th day of February, in the year of our Lord one thousand nine hundred and two.

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 17. Sept. term, 1901. Spreckels Sugar Refining Co., plaintiff in error, *vs.* Penrose A. McClain, collector, etc. Mandate.

53 In the Supreme Court of the United States.

SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
vs.
PENROSE A. MCCLAIN, Defendant in Error. } No. 17.

In error to the circuit court of appeals of the United States for the third circuit, September term, 1901.

Petition for Writ of Error to the Supreme Court of the United States.

Spreckels Sugar Refining Company, plaintiff in error in the above entitled cause, being aggrieved by the final judgment made and entered by the court in the above entitled cause, on the 14th day of January, 1902, whereby it is adjudged that the plaintiff in error shall recover (in addition to the sum of one thousand and fifty-six and eighty-two hundredths dollars, with interest from April 17th, 1901, adjudged to it by the judgment of the circuit court of the United States made and entered on the 18th day of May, A. D. 1901,) only such damages as it suffered by reason of the fact that it was required to pay the tax upon its gross receipts otherwise than annually, which damages, as appears by the special verdict rendered in said cause, were only the sums of $3,321.23 and $36.75, making a total of $3,357.98; and whereby it is further adjudged that the twenty-seventh section of the act of Congress, approved June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," is constitutional, comes now by its attorney John G. Johnson and petitions the court for an order allowing the said plaintiff in error to prosecute a writ of error
54 from the said judgment to the Supreme Court of the United States in accordance with the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which plaintiff in error shall furnish upon such writ of error, and that upon giving such security all further proceedings in this court shall be stayed until the determination of said writ of error by said Supreme Court of the United States.

And your petitioner will ever pray.

JOHN G. JOHNSON,
Attorney for Petitioner,
Per J. W. BAYARD.

June 28th, 1902.

(Endorsed:) No. —, —— sessions —. In the Supreme Court of the United States. Spreckels Sugar Refining Company, plaintiff in error, *vs.* Penrose A. McClain, defendant in error. Petition for writ of error to the circuit court of appeals for the third circuit. John G. Johnson, 1001 Chestnut St. Philadelphia. Filed July 5, 1902.

55 In the Supreme Court of the United States.

SPRECKELS SUGAR REFINING COMPANY, Plaintiff in Error,
vs.
PENROSE A. McCLAIN, Defendant in Error. } No. 17.

In error to the circuit court of appeals *for* the United States for the third circuit, September term, 1901.

Specifications of Error.

I. The learned circuit court of appeals erred in dismissing the first specification of error of plaintiff in error to the judgment of the circuit court of the United States for the eastern district of Pennsylvania. Said specification of error was as follows:—

"1. The learned judge erred in deciding that section 27 of the act of Congress, approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures and for other purposes,' is valid and constitutional."

II. The learned circuit court of appeals erred in dismissing the second specification of error of plaintiff in error to the judgment of the circuit court of the United States for the eastern district of Pennsylvania. Said specification of error was as follows:—

"2. The learned judge erred in deciding that the plaintiff was liable to taxation under the provisions of the said section of said act."

III. The learned circuit court of appeals erred in dismissing the fifth specification of error of plaintiff in error to the judgment of the circuit court of the United States for the eastern district of Pennsylvania. Said specification of error was as follows:—

56 "5. The learned judge erred in deciding that the plaintiff was liable under said section of said act to taxation upon interest received by plaintiff upon its investments."

IV. The learned circuit court of appeals erred in dismissing the sixth specification of error of plaintiff in error to the judgment of the circuit court of the United States for the eastern district of Pennsylvania. Said specification of error was as follows:—

"6. The learned judge erred in deciding that the plaintiff was liable to taxation under the provisions of said section of said act upon its receipts from rent and wharfage."

"V. The learned circuit court of appeals erred in dismissing the seventh specification of error of plaintiff in error to the judgment of the circuit court of the United States for the eastern district of Pennsylvania. Said specification of error was as follows:—

"7. The learned judge erred in not deciding that the plaintiff was in no event liable under the provisions of said section of said act to taxation upon its receipts from any other source than the sales made since the 13th day of June, 1898, of sugar by it manufactured."

JOHN G. JOHNSON,
Attorney for Plaintiff in Error,
Per J. W. BAYARD.

June 28th, 1902.

(Endorsed:) No. —, —— session —. In the Supreme Court of the United States. Spreckels Sugar Refining Co., plaintiff in error. *vs.* Penrose A. McClain, defendant in error. Specification of error. John G. Johnson. Filed July 5. 1902.

57 Know all men by these presents, that we Spreckels Sugar Refining Company, as principal, and Robert Walker and W. Edgar Buchanan, as sureties are held and firmly bound unto Penrose A. McClain in the full and just sum of one thousand ($1000.) dollars, to be paid to the said Penrose A. McClain certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this second day of July in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the circuit court of appeals of the United States for the third circuit in a suit depending in said court, between Spreckels Sugar Refining Company, plaintiff in error and Penrose A. McClain defendant in error a judgment was rendered against the said Penrose A. McClain and in favor of the said Spreckels Sugar Refining Company in a much less sum than was claimed by said company and the said Spreckels Sugar Refining Company plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Penrose A. McClain, defendant in error citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Spreckels Sugar Refining Company plaintiff in error shall prosecute its writ of error to effect, and answer all damages and costs if
58 it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SPRECKELS SUGAR REFINING COMPANY,
By W. W. FRAZIER, JR., *Sec'y.*
[CORPORATE SEAL.]

ROBERT WALKER. [SEAL.]
W. EDGAR BUCHANAN. [SEAL.]

Sealed and delivered in presence of—
JOHN B. WHIDDEN.
CHAS. L. PACKER.

Approved by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

The above bond is satisfactory to defendant in error.
JAMES B. HOLLAND,
U. S. Attorney.

T.

7/2/1902.
6—103.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals of the United States for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Spreckels Sugar Refining Company, plaintiff in error and Penrose A. McClain defendant in error a manifest error hath happened, to the great damage of the said Spreckels Sugar Refining Company plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of July, in the year of our Lord one thousand nine hundred and two (1902).

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

60 UNITED STATES OF AMERICA, *ss:*

To Penrose A. McClain, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of appeals of the United States for the third circuit wherein Spreckels Sugar Refining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 3rd day of July, in the year of our Lord one thousand nine hundred and two.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

61 July 7th, 1902.—Service accepted

JAMES B. HOLLAND,
United States Attorney.

T.

62 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to sixty-one inclusive to contain a full, true, complete and faithful copy of the original transcript of record in the case of Spreckels Sugar Refining Company, plaintiff in error against Penrose A. McClain, collector of internal revenue for the first district of Pennsylvania, defendant in error, on file, and now remaining among the records of the said court in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-ninth day of July in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-seventh.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 18,631. U. S. C. C. of appeals, 3rd circuit. Term No. 103. Spreckels Sugar Refining Company, plaintiff in error, *vs.* Penrose A. McClain, collector of internal revenue for the first district of Pennsylvania. Filed July 30, 1902.

IN THE

Supreme Court of the United States.

Spreckels Sugar Refining Company,
Plaintiff in Error,

vs.

Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

[Record No. 18,631.]

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

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JOHN G. JOHNSON,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Spreckels Sugar Refining Company, Plaintiff in Error,

vs.

Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

October Term, 1903.

No. 103.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

I. STATEMENT OF THE CASE.

In the Circuit Court of the United States for the Eastern District of Pennsylvania the plaintiff in error, a sugar refining company, incorporated under the statutes of Pennsylvania for the purpose "of refining sugar, which "will involve the buying of the raw material therefor, "and selling the manufactured products, and of doing "whatever else should be incidental to the said business "of refining," sought to recover from the defendant in error, the Collector of Internal Revenue for the First District of Pennsylvania, certain sums of money which it had paid to him under protest, the same having been exacted by him under section 27 of the War Revenue Act of 1898. All the statutory prerequisite requirements of suit having been complied with, the only question was,

whether or not the sums which had been paid, had been illegally demanded and collected.

The plaintiff in error contended (1) that all the sums which had been collected had been illegally collected because of the unconstitutionality of the Act, and (2) that even though the Act, *quâ* sugar refining companies, was constitutional, payment of the tax had been exacted monthly when it was only due annually, and a tax had been imposed and collected upon certain items of receipts which were not made subject to taxation by section 27. The specific items of alleged improper assessment were upon receipts of moneys by the plaintiff in error, hereafter called Refining Company, antecedently to the Act; upon its receipts from stevedoring; upon its receipts from wharfage for the use of Refining Company's wharves; upon its receipts of interest paid to it by brokers upon its deposits, and of dividends upon shares of stock held by it in other companies; and in exacting payments of the tax monthly instead of annually.

The learned judge in the Circuit Court entered judgment in favor of the Refining Company for the amounts which had been paid by it as a tax upon receipts of money antecedently to the Act, and upon receipts of stevedoring. No appeal was taken by the United States from this portion of his judgment, and the points involved in those matters is not before this court.

He entered judgment in favor of the United States against the Refining Company upon all the other questions.

An appeal was taken by the Refining Company to the Circuit Court of Appeals for the Third Circuit. It sustained the appeal so far as it involved the question of the right of the United States to exact payment of the tax monthly instead of annually. From this portion of the judgment no appeal has been taken by the United States.

The learned Circuit Court of Appeals decided, the court being divided in opinion, that a tax was properly assessed upon the receipts of wharfage, of interest upon

deposits of the company's money, and of dividends on its shares of stock. It also decided in favor of the constitutionality of the Act.

From this judgment of that court the present appeal was taken.

The Refining Company was the owner of wharves on the river Delaware, at which vessels landed their cargoes. The principal use of these wharves was by ships which brought sugar to the Refining Company, but they were public wharves, which were open to public use and were, by the public generally, used. The United States Government assessed a tax upon the receipts from this source.

The Refining Company was also the owner of shares of stock in other corporations, presumably to a large extent, sugar refining companies, which, respectively, paid tax as sugar refineries. It also had, from time to time, large sums of money to its credit in banks, which paid it (defendant) interest thereon. From time to time it collected the dividends declared upon the shares of stock it held. Upon all these receipts taxes were assessed.

II. ASSIGNMENTS OF ERROR RELIED UPON.

The Refining Company relies upon assignments of error to the action of the Circuit Court of Appeals, in deciding (1) that the Act of Congress, approved 13th June, 1898, so far as it assessed a tax upon the gross receipts of sugar refining companies, was constitutionally made; (2) that its receipts from wharfage were liable to taxation; and (3) that its receipts of interest upon its deposits and of dividends upon shares of stock to it belonging were liable to assessment.

III. ARGUMENT.

We will consider the case under two heads, viz., (1) whether or not the section of the War Revenue Act imposing a tax on sugar refining companies' receipts

was constitutional, and (2) whether the tax imposed upon the specific items complained of, was properly exacted. While the discussion will be under these two heads; what is thought necessary to be said upon the question of the unconstitutionality of the section will be said last.

The Collector claimed that the section was constitutional because it imposed, not a tax upon property, but an excise tax, and the learned judges in the Courts below so held.

We will therefore assume, in seeking to establish the incorrectness of the decisions, which sustained the tax upon the items complained of, that the section imposed an excise tax and was therefore constitutional. If the section was unconstitutional, all questions of detail will be unimportant.

We therefore maintain two propositions.

I. SECTION 27 OF THE WAR REVENUE ACT IMPOSES AT MOST AN EXCISE TAX UPON THE BUSINESS OF SUGAR REFINING AND THE RECEIPTS THEREOF. NO TAX WAS IMPOSED UPON SUGAR REFINING COMPANIES OR OTHER PERSONS OR CORPORATIONS, UPON RECEIPTS OF ANY BUSINESS OTHER THAN THAT OF SUGAR REFINING.

II. SECTION 27 OF THE WAR REVENUE ACT IS UNCONSTITUTIONAL BECAUSE IT IMPOSES A DIRECT TAX NOT IN ACCORDANCE WITH CONSTITUTIONAL REQUIREMENTS.

I. Section 27 of the War Revenue Act imposes at most an excise tax upon the business of sugar refining and the receipts thereof. No tax was imposed upon sugar refining companies or other persons or corporations, upon receipts of any business other than that of sugar refining.

This proposition will be discussed under two heads:—

(*a.*) Section 27 imposes no tax upon receipts by sugar refining companies from wharfage paid to them for the use of wharves to them belonging.

(*b.*) Section 27 imposes no tax upon receipts by sugar refining companies of interest paid to them upon their deposits in bank or of dividends from investments by it in shares of stock of other corporations.

(a.) *Section 27 imposes no tax upon receipts by sugar refining companies from wharfage paid to them for the use of wharves to them belonging.*

The testimony with regard to the wharfage was given by Mr. Joseph A. Ball. (Record, pages 9, 10, 13.) He testified that the Refining Company had three wharves on the Delaware River; that vessels which came to said wharves paid what was called "wharfage," for the privilege of lying along the same; that this "wharfage" was prescribed by a general tariff; that a large part of the raw sugar which it refined was imported into the port of Philadelphia; that vessels which brought such cargoes for use in the refinery were charged wharfage; that many of these vessels contained raw sugar imported by the Refining Company, as the result of purchases made by it abroad; that the wharves were built for the purpose of transacting any shipping business that it might have or for which it should see fit to use the same; that nearly all of the business done at said wharves was the unloading of sugar consigned to it, and that upon its receipts from such wharfage the company had been compelled to pay a tax.

It thus appeared that the Refining Company collected wharfage generally, and from vessels not chartered to it, which transported to it raw sugar purchased abroad and imported by it into this country. Was there any obligation upon it to pay any percentage upon receipts from this source? The learned judge, in his opinion sustaining the imposition of the tax upon this portion of the plaintiff in error's receipts, said (Record, page 27):—

> "Scarcely any vessels lie at these wharves except "the vessels that bring raw sugar to the plaintiff, "and the wharves are used for the convenience and "greater profit of the corporate enterprise. The "money paid by the vessels for wharfage is, I think, "a receipt of the business."

It was contended by the United States attorneys, that the percentage was required to be paid upon the "gross "amounts of all receipts"; and that as the receipts by the plaintiff in error from "wharfage," were part of said gross receipts, the amount thereof was necessarily included in that upon which the percentage was calculated.

The plaintiff in error does not contend that if the percentage must be calculated upon the amount of all "its "gross receipts," amounts received from wharfage must not be included. The contention is, however, that the percentage must be calculated simply upon the gross receipts from the business of refining, not upon those derived from any other business which it may conduct. This branch of the argument, being made upon the assumption that an excise tax is legally imposed by section 27 upon the business of refining sugar, such section must naturally be so construed as not to impose an increased excise tax upon the business of sugar refining, because of the doing by the sugar refiner, of some other business similar to that done by other persons who are not taxed therefor.

The tax is imposed, not only upon every company, but also upon "every person, * * * carrying on, or doing, "the business of refining sugar."

Could it possibly be held, in the case of an individual, carrying on the business of a banker, of manufacturing steel, of investing his money, and of refining sugar, that it would be his duty to pay a tax equivalent to a percentage, upon his receipts from banking and manufacturing, and in the shape of dividends, as well as from refining sugar? Would not such person be exempt from any duty to make return of his receipts from his banking, from his steel manufacturing, and of dividends upon his general investments? Would he not fully satisfy the requirements of the section by making returns of his gross annual receipts from the business of refining sugar?

If an individual can be compelled only to make return of his gross annual receipts from the business of refining sugar, how can it be held that a company which transacts

several different kinds of business, including that of refining sugar, must pay a percentage upon anything other than upon its gross receipts from the latter?

It is true the plaintiff in error bought raw sugar abroad and imported it into this country for the purpose of refining, and, thereafter, of selling the same when refined. The business of importing the raw material, however, was as distinct when conducted by it, as it would have been if it had been conducted by a sugar merchant. It would have been within the power of the plaintiff in error to purchase its sugar from an American merchant after the latter had imported the same. The business of the American merchant would not have been taxable, because it was not that of "refining sugar." Why, then, should the receipts from an entirely separate business be held taxable, when the Government intended only to impose a so-called excise tax upon the business of refining sugar?

The business of building wharves for the accommodation of vessels with the power to demand wharfage therefor was still more distinct than would be the business of a sugar importer. The wharfage was paid by third persons, who, under charter parties, transported and delivered the sugar to the plaintiff in error, and who paid wharfage for the accommodation rendered to their vessels.

A reference to the Act shows that "every person or "company carrying on or doing the business of refining "sugar, whose gross annual receipts exceed $250,000, "shall be subject to pay annually a special tax, equivalent "to one-quarter of one per centum, on the gross amount "of all receipts of such persons * * * and companies "in their respective business in excess of said sum of "$250,000."

We submit that the tax alleged to be an "excise" tax, exacted because of the privilege of carrying on the business of refining sugar, was imposed, and was meant to be imposed, only upon the gross annual receipts from "the "business of refining sugar." It was not necessary to insert after the words, "the gross annual receipts," the word "therefrom." An excise tax imposed upon the business of

refining sugar is properly determinable only by a percentage of the gross annual receipts of such business.

The tax is not imposed upon the person or company, and, as the Government contends, it is not imposed upon the property of either. The "business" being subjected to an excise tax because of its being conducted, the amount of the tax must be ascertained by a percentage of the gross annual receipts of such business solely.

Why should the plaintiff in error be compelled to pay a percentage upon the sums received by it for the use of its wharves, when all other wharf owners are exempt from taxation upon their receipts from a like source?

It is not within the province of the defendant in error to claim that the sugar refining company was incorporated only for the purpose of doing the business of sugar refining. If it committed, and we deny that it did, any act *ultra vires,* it is responsible only to the Commonwealth which created it. The United States is not entitled, even though it should prove that the plaintiff in error did what was unlawful, to exact a share of what may be established to have been unlawful gain. If a tax is imposed upon the receipts of sugar refining alone, whether the Refining Company did business other than that, or whether such business, if done, was unlawful, is immaterial, because upon such other business, as we claim, no tax is imposed.

In the case of persons manufacturing and refining beet sugar, the Department of Internal Revenue has expressly held that they are not liable to taxation upon their gross receipts from refined sugar. The ruling of the Department to this effect was made on the fourth day of August, 1898, and was thereafter acted upon continuously. It held that the sugar refiners who limited their refining operations to sugar extracted from beets or cane produced by themselves were not sugar refiners, but sugar manufacturers, and were therefore exempt from the tax imposed upon "per-"sons carrying on or doing the business of refining sugar."

The interpretation put upon the Act by the Treasury Department would work a manifest injustice as between two sugar refining companies, one owning wharves and the

other not. Each would be charged an alleged "excise" tax upon the receipts of its business and the one which had happened to invest a portion of its capital in the construction of wharves, would be obliged to pay an additional tax upon something entirely apart from its refining business.

There is an additional objection to the tax upon wharfage receipts, growing out of the fact that even if a tax upon the receipts of business may be imposed by way of "excise," such tax may not be imposed upon receipts in the nature of rentals, because such tax is one upon the property itself, and is illegal because, being a direct tax, it is not apportioned.

What matters it how the raw sugar is produced, or what is done in the way of bringing it to the refinery, if the business of refining the same alone was taxed through the instrumentality of a percentage upon the business of refining?

A manufacturer of steel plates might import pig iron, and, in order that his importation might be facilitated, might construct wharves, to be used by the vessels bringing such pig iron to him. In case of a tax imposed upon his business of manufacturing steel plates, would he be obliged to make return of the amounts received by him as wharfage, even though most of the vessels using his wharves came to the same in order to discharge iron belonging to him?

The refiner of sugar, in his business of refining, deals with raw sugar. His business is to transform raw sugar into refined. Nothing done with the view of procuring the raw material constitutes any part of the converting of the same into the new product, refined sugar, by the process of refining.

In the discussion under this head, we are dealing with the intent of Congress. It meant to compel sugar refiners to pay a license for the doing of a refining business. It saw fit to prescribe a method of ascertainment of the amount to be paid by reference to the volume of the business. A fair construction of the language limits the receipts to receipts from the business to be taxed solely.

The Department ruling to which we have heretofore referred is again embodied in its circular of 7th July, 1899 (Record, page 17), in these words:—

"(5.) *Sugar Produced and Refined by Continuous Process.*—Manufacturers who claim to refine only "sugar of their own production, and to sell directly "to consumers, will also be required to furnish a "monthly sworn statement (to be attached to the "prescribed return, Form 420, revised), setting forth "specifically that all sugar refined by them during "the month was produced and owned by them, and "was refined on the same premises where produced "and by a continuous process, and was sold directly "to consumers. Persons, firms, corporations and "companies refining sugar not so produced, owned "and sold, will be liable to the special excise tax "imposed, and will be required to render a return on "the prescribed form of the gross amount of all re-"ceipts."

If the Act really meant what the Department said, it was unconstitutional, because it imposed an "excise" duty upon one class of refineries, and exacted no such duty from another. The plaintiff was made to pay the tax, whilst its competitors, who refined sugar made from the juice of domestic beets and cane, were allowed to escape, thereby producing "unjust and illegal discrimination be-"tween persons in similar circumstances material to their "rights." Yick Wo *vs.* Hopkins, 118 U. S., 356.

(b.) *Section 27 imposes no tax upon receipts by sugar refining companies of interest paid to them upon their deposits in bank and of rividends from investments in shares and other securities.*

What has been said under the preceding head is equally applicable to the present. An excise tax upon the gross receipts of a corporation carrying on the business of refining ought not to be imposed, and, as we contend, under section 27, was not imposed upon the income derived by the company, not from its refining, but from its investments and deposits.

Again, we suggest the illustration of an individual, carrying on incidentally the business of refining sugar. Under section 27, would it be his duty to include, amongst his gross receipts, for the purpose of enabling a percentage to be exacted, income from his investments and dividends upon his shares?

Before concluding our argument under this head, it may be well to reproduce section 27, with a view to showing the full scope of the Congressional intention, by a quotation of the words which specify all the kinds of business taxed:—

> "That every person, firm, corporation or company "carrying on or doing the business of refining petro- "leum, or refining sugar, or owning or controlling "any pipe line for transporting oil or other products, "whose gross annual receipts exceed $250,000, shall "be subject to pay annually a special excise tax "equivalent to one-quarter of one percentum on the "gross amount of all receipts of such persons, firms, "corporations, and companies in their respective "business in excess of said sum of $250,000. And a "true and accurate return of the amount of gross "receipts as aforesaid shall be made and rendered "monthly by each of such associations, corporations, "companies or persons to the collector of the district "in which any such association, corporation or com- "pany may be located, or in which such person has "his place of business."

To ascertain precisely what is meant by what is pretended to be imposed, viz., an "excise tax," we will state the meaning of the word "excise" as given in the Century Dictionary:—

> "An inland tax or duty imposed on certain com- "modities of home production and consumption, as "spirits, tobacco, &c., or on their manufacture and "sale. In Great Britain the licenses to pursue certain "callings, to keep dogs, to carry a gun, and to deal "in certain commodities, are included in the excise "duties, as well as the taxes on armorial bearings, "carriages, servants, plate, railways, &c. Excise

"duties were first imposed by the Long Parliament "in 1643. * * * But the success of internal or "inland duties on articles of consumption—or *excises*, "as they were termed, from the excision of a part of "the article taxed—in Holland, had brought prom- "inently into notice the advantages of taxes of this "description. (S. Dowell, Taxes in England, II., 8.) "*Excises* is a word generally used in contradistinction "to imposts in its restricted sense, and is applied to "internal or inland impositions, levied sometimes "upon the consumption of a commodity, sometimes "upon the retail sale of it, and sometimes upon the "manufacture of it. (Andrews on Revenue Law, "section 133.) An *excise* 'is based on no rule of "'apportionment or equality whatever,' but is a "fixed, absolute and direct charge laid on merchan- "dise, products or commodities, without any regard "to the amount of property belonging to those on "whom it may fall, or to any supposed relation "between money expended for a public object and a "special benefit occasioned to those by whom the "charge is paid. (Blackwell on Tax Titles, 4th ed., "1, n. 1.)"

Bouvier defines "excise" as "an inland imposition, paid "sometimes upon the consumption of the commodity, and "frequently upon the retail sale. 1 Bla. Com., 318; Story, "Const., section 950; Cooley, Tax., 4."

Congress professes to impose an "excise tax," and if such was its intent, the purpose was, not to tax the person generally, nor to tax any specific article as property, but to tax the "business" of dealing in specific articles or of doing a specific thing.

The tax was imposed upon three specific classes of business, viz., refining petroleum, refining sugar, and owning or controlling a pipe line for transporting oil or other products. It follows, inevitably, that as a tax was imposed upon the business, the amount thereof was directed to be ascertained by the amount transacted of the business taxed. When, therefore, a percentage was required to be paid upon the gross amount of all receipts of such persons, firms, corporations and companies, "in

"their respective business," it was not meant to increase the "excise" tax upon the business specified by taxing any other business, nor the receipts therefrom.

The percentage is to be ascertained, "on the gross "amount of all receipts of such persons, &c., in *their* "*respective business*," &c. What is the "respective busi- "ness," the gross amount of the receipts of which is subjected to a percentage? In the refining of petroleum, it is the business of refining petroleum; in the refining of sugar, it is the business of refining sugar; and in the owning or controlling a pipe line for transporting oil or other products, it is the business of transporting oil or other products through a pipe line thus owned or controlled.

Not the slightest disposition is evidenced to subject to the percentage, any gross annual receipts of the persons conducting or doing the specified class of business, other than those derived by them from the business particularized.

For example, take the case of a person engaged in the business of banking, but conducting, also, a small sugar refinery, with gross annual receipts from his refinery of but $10,000, and from his banking business of, say, $500,- 000. Would he be obliged to pay a tax upon $260, 00, part of his total receipts for the year, although in his business of refining, he received but $10,000?

The Act provides that every person, &c., "carrying on "or doing the business of refining petroleum, or refining "sugar, or owning or controlling any pipe line for trans- "porting oil or other products, whose gross annual re- "ceipts exceed $250,000, shall be subject to pay annually "a special excise tax, equivalent to one-quarter of one per "centum on the gross amount of all receipts of such per- "sons, &c., *in their respective business*, in excess of said "sum of $250,000." It is not the receipts generally of the person, firm, corporation, &c., but the receipts of those carrying on one or other of the classes of business specified, which are made the basis of the percentage. The immediate antecedent of the words "gross annual

"receipts" is the business of doing one, or other, of the things specified. Immediately thereafter, the receipts are again spoken of as "receipts of such persons, &c., in their "*respective business.*"

What business? Clearly, the business of refining petroleum, or of refining sugar, or of owning or controlling pipe lines for the designated purpose. No business is spoken of other than that of refining petroleum, or of refining sugar or of owning or controlling a pipe line. There is no antecedent of general business of which avail can be made for the purpose of swelling "the gross "amount of all receipts of such persons, &c., in their re- "spective business." A person engaged in carrying on a business different from that of refining petroleum or sugar, in addition to the latter business, is subject to no tax, and is required, concerning said business, to make no return. The return which is required is "of the amount "of gross receipts as *aforesaid.*"

We will concede that if the tax was legal, and if it was imposed upon the person to an amount equal to all his receipts, or upon the property generally of the person, or upon all the business of the person, the contention of the United States might be sustained; but we submit, with earnestness, that a person carrying on a specific business, required to make returns of said business, and subjected to an excise tax dependent upon a percentage of the gross receipts of his business, cannot be compelled to include in said returns, receipts from any other than the particular business specified.

If the business referred to in the requirement of the payment of a percentage equivalent to the gross amount of all receipts of certain persons, &c., "in their respective "business," is all business, of every sort and kind transacted by persons, &c., doing a specified business, then the learned judges in the courts below were right. If, however, the business referred to, under the designation of "respective business," was that designated in the last preceding antecedent, then they were wrong.

The nature of the investments of the appellant in secur-

ities does not clearly appear. They were, necessarily, to a certain extent, shares of stock, and, possibly, to a large extent, shares of stock in other sugar refining companies. Whatever dividends, therefore, were derived from shares of stock, must have been derived, *inter alia*, from shares of stock of other sugar refining companies, also engaged in sugar refining.

To such extent as the appellant received dividends upon shares of stock held by it in other sugar refining companies, these dividends were paid to it by the companies out of the profits of sugar refining done by them, in pursuance of a license tax which had been determined by reference to their receipts from such refining. In no sense were receipts of such dividends by the appellant company receipts from its business of refining sugar. It was solely by reason of sugar refining done by the subsidiary companies that the latter received moneys out of which their dividends were declared. Had the Refining Company done no business whatever, it would have received such dividends, but would have been subject to no license tax. The latter, therefore, cannot, in any way, be treated as receipts from its business of refining sugar.

In People *ex rel.* Chicago Junction Railways and Union Stock Yards Company *vs.* Roberts, 154 New York, 1, the relator was a New Jersey corporation, which was the owner of the entire capital stock of the Union Stock Yards and Transit Company of Illinois, engaged at Chicago in the business of "yarding" and feeding cattle. A jurisdiction to tax the relator depended "upon the exist-"ence of two concurring conditions, viz., that the corpo-"ration sought to be taxed shall be *doing business* in this "State; and, second, that its capital, or some portion "thereof, shall have been employed within this State." All the judges concurred in holding that the business of the subsidiary, was not the business of the holding, corporation, and that the only business carried on by the latter was the receipt by it of dividends from the former, and the declaring and paying by it of its own dividends. A majority of the judges held that in this business no

"capital" (as distinguished from income) could be said to be employed in the State of New York, and that the corporation was not, therefore, taxable in that State. Upon the first point, in which all the judges were in accord, their opinion was expressed by Judge Vann:—

> "Nor was it" (the holding corporation) "engaged in "business within the State of Illinois, for it neither "managed nor had the right to manage the business "of the Union Stock Yard and Transit Company, of "which it was the chief stockholder. *The business "of that corporation was not its business, for it could "not directly control the smallest detail thereof.* * * * "It was, so to speak, an '*incorporated gentleman of* "'*leisure.*'"

Even if we should concede that the dividends upon the subsidiary corporations are, within the letter of the statute, receipts in its business of sugar refining, they can, in no sense, be held to be receipts within its meaning. The court below held that the tax was not a direct tax upon the refiner's gross receipts, but an excise or license tax upon its business of refining sugar, the amount of the tax being intended to be proportionate to the magnitude of that business as evidenced by its gross receipts in each tax year. How, then, under the view of the tax held by the court below, can it be supposed Congress intended an excise tax, determined as to amount by the business done by the company, should be affected by business done, not by it, but by some other company? The United States is entitled to its excise tax upon the business of sugar refining; but it must exact it from the "person, firm, corporation or company carrying on or "doing the business," not from the stockholder who receives his share of the profits of such business.

In People *vs.* Albany Ins. Co., 92 N. Y., 458, an annual franchise tax upon certain corporations, having been imposed by the law of New York, to be measured by the amount of dividends made or declared during the year, the defendant had on hand a large surplus fund, all of which had been earned and acquired before the Act went

into effect. It was held that a portion of this surplus which was divided amongst its stockholders in shape of a dividend, was not taxable. The court said:—

> "It (the surplus) might have been the measure of "the enjoyment of the franchise during those pre- "vious years when the franchise was not taxable, but "was no measure of the value of such enjoyment dur- "ing the year 1880 or 1881, and these aggregated "earnings of several years were certainly no criterion "of the value of such franchise during any single "year. A division of property thus previously ac- "quired could not have been within the contempla- "tion of the framers of the Act in fixing upon the "annual dividends as a measure of the value of the "franchise of the corporation; and, even if a dividend "within the letter of the Act, to construe it as a "dividend for the purposes of the Act would be so "contrary to its spirit and intent that such a con- "struction is inadmissible."

In Bailey *vs.* Railroad Co., 106 U. S., 109, the New York Central Railroad Company had declared a stock dividend of eighty per cent. against improvements paid for by it out of earnings during several years prior to the passage of the Internal Revenue Act of 1864, which Act had declared that—

> "Any railroad * * * company * * * that "may have declared any dividend in scrip or money "due or payable to its stockholders as part of the "profits or gains of such company * * * shall be "subject to and pay a duty of five per centum on the "amount."

It was held by this court that only so much of the dividend as came from earnings made after the passage of the Act could be taxed. It was said:—

> "It is now urged in argument * * * that "when such a dividend has once been declared and "ascertained to come within the description of the "law as a subject of taxation, all the rest follows, "and the amount declared is necessarily established

"as the amount to be taxed. * * * the tax pro-
"vided for in this section is an annual income tax,
"and its subject is the interest paid and profits earned
"by the company for each year and year by year,
"and that both by the express letter of the law and
"its necessary implications the tax is not laid on any
"of these funds which came into being before the
"time prescribed in the Act. * * * The subject
"matter of the tax is the net earnings of the com-
"pany for the year for which they are taxed which
"have been actually realized by it, or which the law
"assumes to have been."

Even if it be held that the Refining Company's receipts of interest from loans and investments in interest-bearing securities are receipts from its business of sugar refining, it cannot be possibly held that its receipts of dividends from the business of another corporation, come within the same category.

To hold the dividends collected by the Refining Company upon shares of stock in other sugar refining companies by it owned, were liable to be returned as part of its receipts, works double taxation, inasmuch as these dividends are part of a fund arising from receipts in the hands of the subsidiary sugar refining companies from their business of sugar refining, upon which they had been compelled to pay a tax.

Whilst double taxation is possible, it is never presumed in a case like the present. As was said in Cooley on Taxation, chapter VI., page 225, 2d ed., 1886:—

"There is a sense, however, in which duplicate
"taxation may be understood—and which, we think,
"is the proper sense—which would render it wholly
"inadmissible under any constitution requiring equal-
"ity and uniformity in taxation. By duplicate tax-
"ation in this sense is understood *the requirement that*
"*one person or any one subject of taxation shall di-*
"*rectly contribute twice to the same burden, while other*
"*subjects of taxation belonging to the same class are*
"*required to contribute but once.*"

There is nothing in the Act to rebut the presumption that double taxation of receipts from the business of sugar refining was not intended.

In Bailey vs. Railroad Company, already quoted, it was said by this court:—

> "It follows also from this view of the purpose of "the law that a fund taxed in one year as the profits "of a railroad company, used for construction or car- "ried to the account of any fund, has been taxed once "for all, and cannot, as part of the earnings of the "company, be assessed a second time. The tax for "the year is upon the whole amount of the net earn- "ings distributed and enumerated under the heads "pointed out in the statute, and when the tax has "been imposed and collected upon them, or any spe- "cific part of them, there is no authority to levy any "further or additional tax. * * * There has been "a difference of opinion upon the point whether the "tax imposed by this section is upon the corporation "on account of its net profits or upon the income "of the stockholder or bondholder, although in the "present case it is immaterial which of these alter- "natives is adopted. We are not aware, how- "ever, that it has ever been suggested until now that "it might be both in succession, one year a tax upon "the income of the corporation and the next upon "the same fund as the income of the individual. We "do not think this an admissible construction."

In Merchants' Ins. Co. *vs.* McCartney, 1 Lowell, 447; 17 Fed. Cases, 46, the plaintiffs, an insurance company, owned stock in the Suffolk Bank, upon which they received a dividend of $115,200. At the time the Act of June 30th, 1864, was in force; section 120 thereof levied a duty of five per cent. upon the earnings, income or gains of any insurance company, and on all undistributed sum or sums made or added during the year to its surplus or contingent funds. Three-tenths of the dividend declared by the bank consisted of profits laid aside before the passage of this Act. Upon the remaining seven-tenths the bank had itself paid a tax. The Collector of

Internal Revenue had assessed a tax of five per cent. against the plaintiff, the insurance company, upon the whole dividend. The court (Judge Lowell) held that the three-tenths, consisting of profits laid aside before the passage of the Revenue Act, was capital, "not a divi-"dend out of gains and profits," and therefore not tax-able. As to the seven-tenths upon which the bank had already paid the tax of five per cent., the court held it could not be assessed a second time for the tax in the hands of the plaintiff.

It was said by the court (page 449):—

> "The general intent of the legislature not to tax "incomes twice is clear, and so is the injustice of "such taxation; but my decision rests mainly on this: "The intent of Congress was to tax the income of "the shareholders of the Suffolk Bank by a tax levied "directly upon the bank. The income of these plain-"tiffs has been so taxed. I am not ready to believe "that it was intended that the same income should "be again returned to the Government for a new "taxation merely because it passed through another "corporation before reaching the individual owners. "This conclusion I should reach, I think, without aid "from section 117" (exempting dividends received by persons, but not by corporations, from banks which had already paid the tax), "and although that sec-"tion contained no express exemption. * * * I "do decide that the plaintiff corporation itself, as a "shareholder in the Suffolk Bank, is not bound to "treat this dividend on which the income tax has "been paid as income liable to assessment again by "the Government."

II. Section 27 of the War Revenue Act is unconstitutional, because it imposes a direct tax not in accordance with constitutional requirements.

We do not deny the right of Congress to levy an excise tax upon business, in the shape of a license tax, or of a requirement of the payment of a designated amount, because of the privilege of doing business. As long as the

tax is not imposed upon the *rem*, but is required to be paid as a condition, or in consideration, of a business or privilege, it is an excise tax. It does not follow, however, that Congress is at liberty to label a direct tax as an "excise tax," if the assessment is really upon the *rem*.

The United States attorneys, in the court below, suggested that the tax upon legacies and distributive shares of personal property was similar in character to the one of which we complain. The tax assessed under section 29, however, is a tax upon the succession, or devolution, of title. Because of a succession, and upon such succession, a tax is imposed, measurable in the way pointed out by the Act.

The twenty-seventh section of the War Revenue Act requires:—

> "That every person * * * or company carrying on or doing the business of * * * or refining sugar * * * whose gross annual receipts exceed $250,000, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations and companies in their respective business in excess of said sum of $250,000."

Whilst in Pennsylvania, persons have been held to be, or not to be, partners, by reason of the distinction between receiving a percentage of profits, and a sum equivalent to a percentage of profits, it cannot be that a great constitutional provision, designed for the protection of the various States which form the United States, can be made to depend upon a mere play upon words.

A tax of one-quarter of one per centum on the gross receipts, so far as regards the question of whether the same is, or is not, a direct tax, is in no respect dissimilar from a tax, "equivalent to one-quarter of one per centum," of such receipts.

In both cases, the tax is imposed upon the receipts.

Receipts are physical things, consisting of money. The section of the War Revenue Act which we are consider-

ing, requires persons engaged in a certain kind of business to pay a tax of one-quarter of one per centum upon all moneys passing through their hands in the shape of receipts, such receipts being, not those of a broker dealing with the moneys of others, but of a company dealing with receipts from the sale of its own product.

How can this be distinguished from a direct tax assessed upon the moneys?

We respectfully submit that this court has established, in the Income Tax Cases, a principle which renders impossible any tax of the character we are considering.

By the Act of January 1st, 1895 (28 Stat., 509, 553, chapter 349, section 27), it was provided:—

> "There shall be assessed, levied, collected and paid
> "annually upon the gains, profits and income re-
> "ceived in the preceding calendar year by every citi-
> "zen of the United States, whether residing at home
> "or abroad, and every person residing therein,
> "whether said gains, profits or income be derived
> "from any kind of property, rents, interest, dividends
> "or salaries, or from any profession, trade, employ-
> "ment or vocation carried on in the United States or
> "elsewhere, or from any other source whatever, a
> "tax of two per centum on the amount so derived
> "over and above $4000, and a like tax shall be levied,
> "collected and paid annually upon the gains, profits
> "and income from all property owned and of every
> "business, trade or profession, carried on in the
> "United States by persons residing without the
> "United States."

It was held that the tax on the rents or income of real estate was a direct tax within the meaning of that term as used in the Constitution of the United States. This was decided in Pollock *vs.* Farmers' Loan & Trust Company, 157 U. S., 429.

When the case again came before this court (158 U. S., 601), it was held that taxes on the income of personal property are likewise direct taxes.

It was argued by those who maintained the constitutionality of the income tax (158 U. S., 629)—

"That an income tax is not a property tax at all; "that it is not a real estate tax, or a crop tax, or "a bond tax; that it is an assessment upon the tax- "payer on account of his money-spending power as "shown by his revenue for the year preceding the "assessment; that rents received, crops harvested, in- "terest collected, have lost all connection with their "origin, and although once not taxable, have become "transmuted in their new form into taxable subject "matter. In other words, that income is taxable ir- "respective of the source from whence it is derived."

In the opinion of this court, delivered by the Chief Justice, he said (158 U. S., 634):—

"In these cases our province is to determine "whether this income tax on the revenue from prop- "erty does or does not belong to the class of direct "taxes. If it does, it is, being unapportioned, in "violation of the Constitution and we must so declare. "* * * We have considered the Act only in "respect of the tax on income derived from real "estate, and from invested personal property, and "have not commented on so much of it as bears on "gains or profits from business, privileges or employ- "ments in view of the instances in which taxation on "business privileges or employments, has assumed "the guise of an excise tax and been sustained as "such."

The United States attorneys argued in the court below that it was the duty of the plaintiff corporation to pay a tax of one-quarter of one percentum on all moneys received by it from sales of its property made before and after the passage of the Act, and from rentals of its wharves.

So far as regards the wharf rental and interest and dividends, the tax is necessarily one imposed upon the wharves, upon the deposits of oil, upon the shares of stock. This has been so clearly decided that it is unnecessary to waste time in arguing.

In what respect does a tax upon the receipts from the sale of a thing, differ from a tax upon the thing sold? The

tax is not one upon the doing of business, but it is one imposed upon the articles used in such business.

A tax upon the income derived from real and personal property having been held to be a tax upon the real and personal property, in what respect does a tax imposed upon the receipts from sugars sold, differ from a tax upon the sugar itself?

A commission merchant may sell the property of another, and his receipts will be nothing more than the compensation for his skill and experience. The owner of sugar who sells the same is not liable to be taxed upon the sugar. *Ergo* he is not liable to be taxed upon what he derives from its sale.

The business upon which it is claimed that an excise tax was imposed, is that of sugar refining. The amount of the tax is not made determinable upon the quantity of refining, but upon the sales by the Refining Company, of its own property.

If the tax be imposed upon the *rem*, it is unconstitutional because direct. It cannot be made legal, because it is called an excise tax, or is levied because of the doing of a business. What is protected from direct taxation is the *rem*. It is immaterial what motive actuates the Congress in ordering a tax to be assessed thereon.

In the first case in which this court declined to hold the income tax upon personal property as being a direct tax, the Chief Justice said (157 U. S., 579):—

> "We admit that it may not unreasonably be said
> "that logically if taxes on the rents, issues and profits
> "of real estate are equivalent to taxes on real estate
> "and are therefore direct taxes, taxes on the income
> "of personal property as such are equivalent to taxes
> "on such property and therefore direct taxes."

The Chief Justice quoted approvingly Cook *vs.* Pennsylvania, 97 U. S., 566, where it was held that a tax upon the amount of sales of goods made by an auctioneer, was a tax upon the goods sold.

Under the guise of a "special excise tax," upon persons

or corporations carrying on the business of refining sugar, a tax upon the recipts of such persons and corporations is imposed.

In Pacific Insurance Co. *vs.* Soule, 7 Wallace, 445, where a tax imposed upon insurance companies was sustained, Mr. Justice Swayne said:—

> "Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and "sometimes upon the retail sale; sometimes upon the "manufacturer and sometimes upon the vendor."

In the present case, however, the tax imposed was one upon the receipts of moneys derived from the sale of sugars, the price paid therefor being not merely for the refining, but upon the value of the raw material refined. In the Soule case, the tax was imposed upon the business done. There was no physical thing. The insurance companies sold nothing, they simply transacted a business and, upon the amount of this business, a tax was imposed.

In Nicol *vs.* Ames, 173 U. S., 509, upon each sale or agreement to sell, a tax was imposed, regulated by the amount of the sale as fixed by the agreement. In that case, however, no tax was imposed upon the receipts. All that was exacted was payment of a tax upon an agreement of sale in the shape of the attachment of a stamp.

Mr. Justice Peckham, in considering an argument that the tax was a direct tax because one upon the sale of property measured by the value of the thing sold and was therefore a tax upon the property itself, said (page 518):—

> "All the cases involved the question whether the "taxes to which objection was taken amounted practically to a tax on the property. If this tax is not "upon the property or on the sale thereof then these "cases do not apply.
>
> "We think the tax is in effect a duty or excise laid "upon the privilege, opportunity or facility offered "at boards of trade or exchanges for the transaction "of the business mentioned in the Act. It is not a

"tax upon the business itself which is so transacted,
"but it is a duty upon the facilities made use of and
"actually employed in the transaction of the business,
"and separate and apart from the business itself. It
"is not a tax upon the members of the exchange nor
"upon membership therein, nor is it a tax upon the
"sales generally. The Act limits the tax to sales at
"any exchange, or board of trade, or other similar
"places, and its fair meaning is to impose a duty upon
"those privileges or facilities which are there found
"and made use of in the sale at such place of any
"product or merchandise. Whether this facility or
"privilege is such a thing as can be legally taxed,
"while leaving untaxed all other sales made outside
"of such places, will be discussed further on. At
"present it is enough to say that the tax is not upon
"the property sold and cannot on that ground be
"found to be direct. The tax laid in the same Act
"upon a broker's note or memorandum of sale is a
"separate tax, although it may have reference to the
"same transaction. It is a tax on the note or
"memorandum itself where made by a broker, while
"in the other case the tax, although measured, in
"amount, by reference to the value of the thing sold,
"is in reality upon the privilege or facility used in the
"transaction or sale. The tax is not a direct tax
"within the meaning of the Constitution, but is, as
"already stated, in the nature of a duty or an excise.
"The amount of such tax when imposed in a case like
"this may be increased or diminished by the extent
"to which the privilege or facility is used, and it is
"measured in this Act by the value of the property
"transferred by means of using such privilege or
"facility, but this does not make the tax a direct one.
"A tax on professional receipts was recognized by
"the present Chief Justice in delivering the opinion
"of the court on the first hearing of the Income Tax
"case, 157 U. S., 429, 579, as an excise or duty and
"therefore indirect, while a tax on the income of
"personalty, he thought, might be regarded as direct.
"And upon the rehearing, 159 U. S., 601, it was dis-
"tinctly held that the tax on personal property or on
"the income thereof was a direct tax. This tax is

"neither a tax on the personal property sold nor upon
"the income thereof, although its amount is measured
"by the value of the property that is sold at the ex-
"change or board of trade."

So far as the court below permitted a tax to be assessed measured by receipts of wharfage, interest and dividends, it sustained a clearly unconstitutional tax, *i. e.*, one upon wharves, moneys and shares.

JOHN G. JOHNSON,
For Plaintiff in Error.

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No. 103. October Term, 1903.

Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

Spreckels Sugar Refining Company,
Plaintiff in Error,

vs.

Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR IN MATTER OF JURISDICTION.

JOHN G. JOHNSON,
For Plaintiff in Error.

10129

IN THE SUPREME COURT OF THE UNITED STATES.

Spreckels Sugar Refining Company, Plaintiff in Error,

vs.

Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania.

October Term, 1903.

No 103.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR IN MATTER OF JURISDICTION.

The appellate jurisdiction of this court, as it existed antecedently to the Evarts' Act of 1891, still exsts to such extent as, by that Act, it has not been modified.

By the fifth section of said Act, its jurisdiction is expressly reserved in the following cases: (1) where the question is that of jurisdiction of the Circuit Court; (2) in final sentences in prize cases; (3) in cases of conviction of a capital or otherwise infamous crime; (4) in any case involving the construction or application of the Constitution of the United States; (5) in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; (6) in any case in which the Constitution or law of a State is claimed to be in contravention of

the Constitution of the United States; (7) in appeals from the highest court of any State.

By the sixth section, an appellate jurisdiction is conferred upon the Circuit Court of Appeals in all other cases.

The judgments of that court are made final only in a certain class of cases, *i. e.*, (1) in those in which the jurisdiction of the Circuit Court was dependent entirely upon diverse citizenship of the parties; (2) in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

If the present case is one solely arising under the revenue laws the appeal cannot be sustained, because the decision of the Circuit Court of Appeals was final.

We contend, however, that it is one which involved the construction and application of the Constitution of the United States, as well as the construction of the revenue laws. The court below was asked to interpret a revenue law; but it was also asked to determine that, *quâ* the imposition of the tax contested, there was no valid law, inasmuch as the Constitution of the United State forbade the passage of the one challenged.

The jurisdiction of the Circuit Court of the United States was originally invoked for two reasons: (1) because the tax was a direct tax not apportioned in accordance with the requirements of the Constitution of the United States; and (2) because it was not intended by the Act, to include receipts by the plaintiff in error from any other business than that of sugar refining. The case, therefore, as presented to the Circuit Court, involved a question arising under the Constitution of the United States, and also one arising under the revenue laws.

This court has a right to determine the question arising under the Constitution of the United States. The Circuit Court of Appeals would have had no right to determine that question had it not been that the case presented to it, involved also a matter over which it did have jurisdiction, viz., the interpretation of a revenue law of the United States.

This court has finally determined that, saving in cases where the appellate jurisdiction of the Circuit Court of Appeals is made final, an appeal lies to it from the judgment of that court; and that if the appeal to the Circuit Court of Appeals involves a constitutional question, as well as one over which it has appellate jurisdiction, that court may hear and determine both questions; but that in such contingency, the appellate jurisdiction of this court still continues.

The constitutional question in the Circuit Court, (Record, page 25), was thus determined by Judge McPherson:—

> "The principal question raised by this case is the "constitutionality of section 27 of the War Revenue "Act of June 13th, 1898, so far as sugar refiners are "concerned. The plaintiff contends that the tax "imposed by the section is a direct tax, specifically "laid upon the gross receipts of refiners, and is "invalid because it is not apportioned in accordance "with article 1, section 9, clause 4, of the Federal "Constitution; while the Government contends that "the tax is valid because it is not a direct tax, but an "excise laid upon the business of refining, and not "upon the receipts themselves arising from the busi-"ness. The present suit is a test case, destined for the "Supreme Court of the United States, and therefore "I shall not undertake the superfluous and somewhat "difficult task of discussing the numerous decisions "which have more or less bearing on the controversy. "A question of taxation is peculiarly a question for "a court of last resort; for the discussion of the "subject belongs essentially to a region of fiction "and construction, and the final decision is often "determined by considerations of policy alone. "Every tax, in the final analysis, is an exaction "from an individual, or a corporate, taxpayer; but "in many an instance the discussion stops short of "this point, and treats the tax as if it were to be "satisfied by the inanimate object, or the immaterial "franchise, in respect of which it has been imposed. "Frequent examples of such use of words may easily "be found, and this method of speech has led, I

"think, to much confusion and discord among the "cases, so that it is not hard to find ample authority "on almost any phase of a controversy concerning "taxation. In the case now before the court, it "would not be difficult to choose from the decisions "that have been cited by the respective parties, "sufficient authority to support either conclusion, "and, in this state of the question, I believe my duty "to be fully performed when I sustain the con- "stitutionality of the section without discussion, on "the ground that I have not been clearly satisfied "that it ought to be stricken down."

In the Circuit Court of Appeals, (Record, page 35), the constitutional question was thus dealt with:—

"The first and most important question raised "by the assignment of errors is whether the above "section is unconstitutional. This question, how- "ever, the learned judge of the Circuit Court declined "to discuss, because 'the present suit is a test case, "'destined for the Supreme Court of the United "'States;' and for the same reason, we, also, refrain "from discussing it, and deem it expedient to merely "state our affirmance of the constitutionality of the "section, upon the ground that the presumption in "favor of its validity has not been clearly confuted."

It is necessary, therefore, that the constitutional question which has thus been practically relegated by the Circuit Court and by the Circuit Court of Appeals, to this court, for actual decision, shall be by it determined. In dealing with this question, it necessarily considers the whole subject matter of controversy.

In American Sugar Refining Company *vs.* New Orleans, 181 U. S., 277, this court held, that where the jurisdiction of the Circuit Court attached solely because of diverse citizenship, no appeal lies to it from a decision of the Circuit Court of Appeals, even though, in the course of the proceedings in the Circuit Court, a constitutional question arose. This decision was the necessary result of the express provision of the statute. In that case, however, this

court further determined, that if the jurisdiction of the Circuit Court attached, not solely because of diverse citizenship, but also because of a constitutional question, the judgment of the Circuit Court of Appeals was not final.

The decision of the Circuit Court of Appeals is made final in cases arising under the revenue laws; but it is not made thus final in cases arising under the Constitution of the United States.

In Huguley Manufacturing Company *vs.* Galeton Cotton Mills, 184 U. S., 290, this court held:—

> "If the jurisdiction of the Circuit Court rests solely "on the ground that the suit arises under the Consti- "tution, laws or treaties of the United States, then "the jurisdiction of this court is exclusive, but if it "is placed on diverse citizenship and also on grounds "independent of that, then if carried to the Court "of Appeals the decision of that court would not be "made final, and appeal or writ of error would lie."

In Carey Manufacturing Company *vs.* Acme Company, 187 U. S., 427, a case arose under the patent laws of the United States. The jurisdiction of the Circuit Court was invoked originally, solely because of a question which arose under those laws. In a later stage of the proceedings, a constitutional question arose. This was determined by the Circuit Court of Appeals. Such determination was held by this court to be final. The case was one which arose solely under the patent laws, and the statute expressly excluded an appeal, under such circumstances, from the Circuit Court of Appeals.

It can hardly be contended that in making the decisions of the Circuit Court of Appeals final, "in cases arising under "the revenue laws," Congress intended to interfere with the jurisdiction of this court, over appeals arising in cases in which the jurisdiction of the Circuit Court was invoked at the outset, partly because of a constitutional question. Such question, one arising under the Constitution of the United States, can hardly be held to be one "arising under the "revenue laws."

In Robinson *vs.* Caldwell, 165 U. S., 359, the plaintiff

in error sought to maintain his right to two independent appeals, one to the Circuit Court of Appeals, from the judgment of the Circuit Court, and another to this court, from the judgment of the Circuit Court. Of course, his effort proved unsuccessful.

The meaning of Congress, when it provided for cases arising under the patent laws and under the revenue laws, was discussed by the Chief Justice in United States *vs.* American Bell Tel. Co., 159 U. S., 548-553. He said:—

> "How the case might be if the plaintiff had in-
> "voked jurisdiction on two distinct grounds, one of
> "them being independent of diverse citizenship, was
> "not determined. Nor is it necessary to pass upon
> "that question in this instance, for the motion may
> "be disposed of upon the inquiry whether it was
> "manifestly the intention of Congress to include
> "such a case as that before us in the words 'arising
> "'under the patent laws.' Now, actions at law for
> "infringement, and suits in equity for infringement,
> "for interference and to obtain patents, are suits
> "which clearly arise under the patent laws, being
> "brought for the purpose of vindicating rights cre-
> "ated by those laws, and coming strictly within
> "the avowed purpose of the Act, to relieve this
> "court of that burden of litigation which oper-
> "ated to impede the disposition of cases of pecu-
> "liar gravity and general importance. We are
> "of opinion that it is reasonable to assume that
> "the attention of Congress was directed to this class
> "of cases, and that the language was used as appli-
> "cable only to them; and that there is nothing in the
> "objects sought to be attained and the mischiefs
> "sought to be remedied by the Act which furnishes
> "foundation for the belief that Congress mani-
> "festly intended to place a limitation on the appel-
> "late jurisdiction of this court in a case such as
> "this."

JOHN G. JOHNSON,
For Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1946

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,

v.

PENROSE S. MCCLAIN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

No. 167

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,
v.
PENROSE A. MCCLAIN, COLLECTOR OF internal revenue for the first district of Pennsylvania.
No. 103.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case embraced two common-law actions against the collector, which were instituted in the State court and removed to the Federal court.

There was a special verdict (Rec., pp. 19–21) based upon testimony taken and documentary evidence (Rec., pp. 9–19).

The circuit court of appeals concurred with the position and reasoning of the circuit court (Rec., p. 35) as to remitting the main question here for

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authoritative decision, and affirmed the constitutionality of the law on the ground that the presumption in favor of its validity had not been clearly confuted. The circuit court was also affirmed as to the questions now remaining, but as to the legality of monthly collections of tax, and solely on that ground, the judgment of the circuit court was reversed and the cause remanded for further proceedings. (Rec., pp. 34–36.) Judge Gray dissented from his brethren on the affirmance as to interest. (Rec., p. 36.) A writ of error was then sued out from this court.

In the circuit court of appeals (p. 29) and this court certain of the original complaints of error (Rec., p. 3) dropped out under the respective decisions below, as indicated, and the errors now alleged (p. 40) challenge the *validity and constitutionality of the law* (I, II) and the action of the court below in sustaining the tax upon *interest and upon rent and wharfage* (II, IV, V).

THE LAW.

Section 27 of the war-revenue act of 1898 (30 Stat., 448) provides as follows:

> That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on

the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

ARGUMENT.

As to the points decided against the Government, either in the trial court or the circuit court of appeals, viz, the inclusion of receipts from business transacted before the tax year, but actually received after that year began, receipt from stevedoring and the periodic assessment upon monthly returns instead of annually, the Government not having taken a writ of error, these matters appear not to be open to examination here. Nor does there seem to be any ground to challenge the initial right of action and the remedy pursued, since the payment appears to have been involuntary and made under protest, and the statutory appeal to the executive was taken. (*Elliott* v. *Swartwout*, 10 Pet., 137, and other authorities as discussed in *De Lima* v. *Bidwell*, 182 U. S., 1; sec. 3226, R. S.; *Assessor* v. *Osborne*, 9 Wall., 567; *Erskine* v. *Van Arsdale*, 15 Wall., 75; *Wright* v. *Blakeslee*, 101 U. S., 174; *James* v. *Hicks*, 110 U. S., 272; *Williams* v. *Reynolds*, 131 U. S., cxi; *Manhattan* v. *Blake*, 148 U. S., 412).

But there *is* a question of jurisdiction in the circuit court of appeals and in this court, and that point and the constitutional question, with the minor questions on the merits, make the present case.

I.

JURISDICTION.

The court is met at the threshold of the case with the question whether it has jurisdiction to consider the writ of error.

The question whether the act is constitutional in the particulars before referred to was raised in the circuit court and passed upon by that court *pro forma*. The circuit court of appeals likewise, on writ of error, perfunctorily considered the constitutional question and upheld the constitutionality of the act. Both courts were evidently reluctant to consider the constitutional question at length, inasmuch as it was understood that the case was destined for this court, where that question would be finally determined.

The applicable provisions of law for consideration in connection with the question of jurisdiction are as follows:

Section 5 of the circuit court of appeals act provides "that * * * writs of error may be taken from the * * * circuit courts direct to the Supreme Court in the following cases: * * * In which the constitutionality of any law of the United States * * * is drawn in question. * * * In any case that involves the construction or application of the Constitution of the United States."

Section 6 provides "that the circuit courts of appeals * * * shall exercise appellate jurisdiction to review by * * * writ of error final

decisions in the * * * circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases * * * arising under the * * * internal-revenue laws, * * * excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

Construing these provisions, this court, in the case of *Carter* v. *Roberts* (177 U. S., 496, 500), speaking by the Chief Justice, said:

> When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. (*Holt* v. *Indiana Manufacturing Company*, 46 U. S. App., 717; 176 U. S., 68; *United States* v. *Jahn*, 155 U. S., 109; *New Orleans* v. *Benjamin*, 153 U. S., 411; *Benjamin* v. *New Orleans*, 169 U. S., 161.) But when the circuit court

> of appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

In the case of the *American Sugar Refining Company* v. *New Orleans* (181 U. S., 277, 282), the Chief Justice, quoting from *Carter* v. *Roberts* (*supra*), said:

> These observations, perhaps, need some qualification. Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of the law of the United States, or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section five may have so arisen that a direct

> resort to this court might be had does not deprive the court of appeals of jurisdiction or justify it in declining to exercise it.

In the case of *Robinson* v. *Caldwell* (165 U. S., 359), which involved questions as to the construction of a treaty and the constitutionality of an act of Congress, appeals were taken from the circuit court direct to this court and to the circuit court of appeals. The circuit court of appeals determined the case. Mr. Justice Harlan, in delivering the opinion of this court, said:

> As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit court and determined those questions; and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. (26 Stat., 826, c. 517, sec. 5.) But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon it merits.
>
> It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court,

> and as the defendant chose not to await the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.
>
> We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari.

In view of the above decisions, the Government contends that upon the decision of the circuit court, as a constitutional question had been raised in the case, the plaintiff in error had the option, under section 5 of the circuit court of appeals act, to bring the case directly to this court upon that question; or, under section 6 of that act, to go to the circuit court of appeals upon the whole case. The plaintiff in error elected to adopt the latter course. It was not optional with the circuit court of appeals to decline jurisdiction simply because a constitutional question was involved. It was within the power of the court, however, under section 6, to certify the constitutional question to this court, or to proceed and decide the whole case. The latter, the circuit court of appeals did. Having so acted upon the whole case, this court, under the ruling in *Robinson* v. *Caldwell* (*supra*), had no

jurisdiction to review the judgment of the circuit court of appeals on writ of error.

The cases which may be taken to this court on appeal or writ of error from the circuit court of appeals are those which, by the concluding paragraph of section 6 of the circuit court of appeals act, are not made final in that court by that section and those in which the matter in controversy shall exceed $1,000 besides costs. But this is a case arising under the revenue laws, and such cases are made final by section 6 in the circuit court of appeals. To maintain the contrary, and to hold that any case made final by section 6 in the circuit court of appeals which involves a constitutional or other similar question may be brought through the intermediate court of appeals to this court, is practically to nullify the intention of Congress in establishing that court and to add to the expense and delay of litigation by giving two appeals in the same case, for in almost any case a constitutional question may be raised.

The intention of Congress in passing the act was to relieve the burden of this court and to make the classes of cases mentioned in section 6 final in that court, no matter what questions, constitutional or otherwise, might be involved therein, subject, however, to the right on the part of that court to certify (see *United States* v. *Lee Yen Tai*, 113 F. R., 465; 185 U. S., 213) and by this court to review by certiorari.

In the case of *City of Owensboro* v. *Owensboro Waterworks Co.* (115 F. R., 318, 323), Judge Severens, speaking for the circuit court of appeals for the sixth circuit, said:

> But if the original jurisdiction is founded entirely upon the ground of diversity of citizenship, and a constitutional question becomes involved, the appeal might go to either court. If it should go to the Supreme Court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole case, or certify the constitutional question to the Supreme Court, and on receiving its answer, decide the case. If it should decide the constitutional question in the first instance, the unsuccessful party might apply for the writ of certiorari under the provision of the sixth section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which Congress intended to give to the Supreme Court, by one method or another, appellate power over all constitutional questions.

It is evident that the language of the court in the Carter case, "But when the circuit court of appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891," is to be taken in the alternative, that is, that certain classes of cases, i. e., those made final by section 6 of the circuit court of ap-

peals act, in that court, may be reviewed by certiorari; and that other cases, i. e., those which are not final under that section in that court (which would not include revenue cases), and which involve more than $1,000 besides costs, may be reviewed on appeal or writ of error.

If, however, the case is one which should have gone direct to the Supreme Court from the circuit court, under section 5 of the circuit court of appeals act, because it involved a constitutional question, it follows that the Supreme Court has no jurisdiction of the present writ of error, which was sued out to review the judgment, not of the circuit court but of the circuit court of appeals.

In the case of *Loeb* v. *Columbia Township Trustees* (179 U. S., 478, 479), Mr. Justice Harlan, speaking for the court, said:

> It is true that the plaintiff might have carried this case to the circuit court of appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have evoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court, for, as said in *Robinson* v. *Caldwell* (165 U. S., 359, 362), "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals," although the latter court, before

> disposing of a case which might have been brought here directly from the circuit court, may certify to this court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the circuit court of appeals, and thereby cut himself off from the right to have this court declare whether the circuit court erred in holding that the State law upon which he relied for judgment was repugnant to the Constitution of the United States.

In *Huguley Manufacturing Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295), the Chief Justice, speaking for the court, said:

> If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought *here as of right*. (*Loeb* v. *Columbia Trustees*, 179 U. S., 472.) * * * The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals can not be regarded otherwise than as made final by the statute.

In *United States* v. *Jahn* (155 U. S., 109, 112), the Chief Justice used the following language:

> It thus appears that the revisory power of this court and of the circuit courts of appeals, under the act, is to be exercised only in accordance with its provisions, and that the circuit courts of appeals exercise appellate jurisdiction under the sixth section in all cases other than those in which the jurisdiction of this court is exercised under the fifth, among which cases are included all revenue cases—that is, cases under laws imposing duties on imports or tonnage or providing in terms for revenue (*United States* v. *Hill*, 123 U. S., 681), which can only come here on the merits on certificate or certiorari.

The Government does not seek to avoid argument on the merits, but believes this writ should be dismissed for want of jurisdiction, and deems it necessary to discuss the jurisdictional aspect, which is peculiarly and always a matter of concern to this court, and which the court has, in many opinions, in different language, declared is not to be ignored. (Per Mr. Justice Harlan in *Continental National Bank* v. *Buford*, decided November 16, 1903.)

But assuming it to be possible that the court nevertheless may conclude to consider the merits, for the general reason expressed in *Pullman's Car Co.* v. *Transportation Co.* (171 U. S., 138, 145)—although it there appeared that the case was one properly in this court by one or other method of review pursued—and in view of the application

by the plaintiff in error for the allowance of a writ of certiorari, which the Government does not oppose, I proceed to discuss the underlying questions.

II.

THE MERITS.

The chief question is the nature of the tax as direct or indirect. The subsidiary questions left in the case are whether, if the tax is an excise and indirect, it should have been levied upon interest from funds and investments and earnings from wharfage and rent as part of gross receipts.

(a) The subsidiary questions.

The claim that the business is not the refining of sugar; the tax on interest; the tax on wharfage and rent.

As part of the underlying claim affecting these minor questions it is asserted that the tax is not justly laid upon the plaintiff at all, because it manufactures rather than refines sugar. It is sufficient to say that under the facts plainly existing in the sugar trade and shown here—the receipt of cargoes of crude sugar and preparing them for sale to meet present market demands and the selling refined sugar accordingly, the admission that refining was incidental to the business, etc.—the manufacturing is only another name for refining, and the latter process is "incident" to manufacture only in the sense that in the abstract the greater includes the

less, the *genus* the species, and refining is merely a particular variety of the various activities of manufacture. "Refining" and "manufacturing" here are equivalent and identical terms, and none the less because, possibly, after refining in the mass the product was further manufactured to suit the market by grading and packing in bulk in barrels or by fashioning first into cubes or loaves or other shapes. It was all the business of sugar refining. I call attention to the plaintiff's corporate title and to the charter granted by the State of Pennsylvania under which it was and is operating. Surely by these *indicia* the corporation itself knew what business it was engaged in.

As to the matter of interest, wharfage, and rent—it is to be observed that the charter (findings of special verdict, Rec., p. 2) provides for incorporation "for the purpose of refining sugar, which will involve the buying of raw material therefor, and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining."

The property from which these items of income were derived was all part of the capital embarked in the business of sugar refining. It was part of the plant, of the instrumentalities and facilities, by which the business was conducted; or it was the current and reserve funds deposited in bank or invested more or less permanently which constituted or protected the necessary cash and

floating and working capital. Without these things the enterprise could not be a going concern for long; they formed a part of its basis of credit, and were incident to and part of the business. And such income was manifestly, therefore, a liable and computable element in fixing annual value and gross receipts. Because the company was strong, and able to have ample funds and working capital, and to possess large facilities and complete instruments, permitting their profitable use by way of renting to others at times when the company did not need them, is no reason for contending that all these things were not part of the property, embarked in and incident to the business, and producing part of the receipts and income—that they did not properly create an element in the business results upon which the tax was legally based. It would be strange, for instance, if a mercantile appraiser, assessing a grocery business, did not include in arriving at value the cash balance of profit and loss account in the till and receipts from partial or casual rentings of an appurtenant stable and delivery wagons, if those items were revealed.

It is always to be remembered that the company's charter was given to enable it to refine sugar. That is the first and main purpose expressed, and explicitly includes or "involves" (to use the actual term of that instrument) the purchase of raw material, the sale of the manufactured products, and the doing anything and everything else incidental

to the business. Everything which the company did or might do not *ultra vires* was incidental to the business and an integral part of it under the very terms of its right to exist.

I submit that the reasoning of the courts below is conclusive on these points (Rec., pp. 27, 35), and that the learned judge in the circuit court of appeals who dissented as to interest (p. 36) asserted, without convincing or persuasive reasons, the view that interest should be excluded.

The learned counsel for plaintiff in error, supposing a case, contends that an individual who was a banker and a manufacturer in a certain line, who invested as a separate matter his general accumulations, and who also, and as a distinct thing, refined sugar, would not under the law be required as a sugar refiner to pay a tax upon his other and separate receipts; and counsel then seeks to apply this illustration to the present case. But that is not the case here. This corporation was organized to refine sugar. It *may* do several different kinds of business, but that does not appear, and as its only legitimate business under its charter is sugar refining and what is incidental thereto, the several different kinds of business which it is said to do can not be claimed merely to include that of refining sugar. On the contrary, the business of refining sugar includes the other kinds of business which it does, and they are simply incidental thereto. To say otherwise

is to make the less include the greater. In short, there is no such distinct series of entities or capacities in a corporation as is presented in the illustration about the individual banker who also possessed other interests; and this corporation possessed the other interests so far as they are separable at all as merely collateral and subsidiary parts of its sugar-refining enterprise. Although the charter shows that the business involves the buying of the raw material therefor and selling the manufactured product, the argument is advanced that the business of importing the raw material for sugar refining is as distinct when conducted by the corporation as it would have been if it had been conducted by a sugar merchant, for the reason, apparently, that the plaintiff in error might have purchased its raw sugars from an American merchant after the latter had imported the same. But that is a distinction without a difference, and the fact is that this refiner did choose to purchase his raw material abroad and import it, and presumably if it had not done so, would not have owned and maintained wharves. I think the contention of separate business can not be shown, and that the views of the learned courts below are not open to dispute. It is only necessary to see the establishment of this refining company, or of the similar sugar refineries in the harbor of New York, with their appurtenant wharves and shipping facilities, with freighters constantly lying at

them from all parts of the world, bringing, as this plaintiff's own officer and witness shows, only cargoes of raw sugar to the refinery—because the statement is that scarcely any vessels lie at these wharves except such—to be very certain that the wharfage facilities are a necessary part of the business as it is conducted, and receipts from that source, receipts from the business of sugar refining. Of course the various tramp steamers or regular lines bringing such sugars would naturally be navigated under charter parties to third persons who would pay the wharfage; but they transport and deliver the sugar to the plaintiff, and necessarily pay to it the wharfage charges. If that were not so the practical meaning would be that the plaintiff itself owned or controlled the vessels, and then the business of navigation and of operating steamship lines would have been incidental to and part of the business of sugar refining, if, indeed, their existing charter could be so viewed, or had been so framed as clearly to include it.

The United States does not contend that the plaintiff committed any act *ultra vires*, or did what was unlawful, and is not exacting now a share of what might appear to be unlawful gain. The United States merely claims that under the plaintiff's broad and explicit charter powers its wharfage business was part of its sugar-refining business.

The situation as to interest on deposits and dividends from investments is precisely the same,

and the opposing arguments all rest upon the contention that when Congress placed the excise tax upon this particular business it did not intend to tax "any other business nor the receipts therefrom." We find here the suggestion, especially as to rentals, that the tax is one upon the property itself as income, and is illegal, because, being direct, as such it is not apportioned. But it is impossible to pick out casual rentals like this, which are merely part of the natural receipts of this sugar-refining business, and apply with any force the principle of the income-tax decisions applicable to a tax upon income in general from real estate in general or from personal property in general. The route to this result is too circuitous and indirect; in other words, the tax itself is indirect.

Counsel gives another illustration of a banker who also conducts a small sugar refinery, making gross annual receipts from his refinery of $10,000, and from his banking business of, say, $500,000; and then asks the question whether he would be obliged to pay a tax upon $260,000, although in the business of his refining he received but $10,000. This is the same illustration as the initial one, and merely gives a possible case which is at the same time most unlikely and entirely immaterial. As I have said, it makes the less include the greater, the incident rule the substantive thing; for so far as the matter proposed is concerned, it is sugar refining and not

banking, and this is unaffected by the fact that in the individual illustration given the banking business is large and the sugar-refining business small. I am sure that there would be neither difficulty nor unfairness in imposing this sugar-refining tax upon a wealthy gentleman who did a large banking business and among his outside investments owned a small sugar refinery. But I am equally certain that this is a large sugar-refining business, and I presume it is not engaged in the banking business in any sense or to any extent, great or small.

The learned judges below were right, because the requirement of return of gross receipts of certain persons "in their respective business" clearly includes these receipts of these persons in this business, as created under their charter and contemplated in the law. It is not necessary to speculate upon some unknown person doing the specified business and doing numerous other businesses. It is not at all necessary to determine whether in every case, individual and corporate, the respective business includes *all* business transacted of every sort and kind; and obviously from the charter relations and provisions, and from counsel's own illustrations, this corporate case is very different from any supposed individual case.

As to dividends, the record does not show but counsel states that they were necessarily or actually from shares of stock in other sugar-refining companies. He states again that these receipts were in no sense receipts from its sugar-refining

business and can not be so treated. Possibly if the refining company had done no business whatever it would have received such dividends without being subject to a license tax. But then it would have been a bank, or an investment company, or trustee for investors, or some such thing. As matter of fact, it did the business and it was organized and chartered to do the business; and there is certainly an obvious appositeness and "incidental" aspect respecting its refining business in the fact that part of its means and reserve—of the sinews which made it a strong and going enterprise—should have been an interest in other sugar-refining concerns.

As to the learned counsel's authorities—in *People ex rel., etc.*, v. *Roberts* (154 N. Y., 1)—there were two corporations, and one did not do any business at all, but merely received dividends from the other. That case is not applicable; this company is not "an incorporated gentleman of leisure." It is rather an "incorporated gentleman" who is very active—in refining sugar and doing collateral things.

Counsel speaks of the corporations whose stocks are held as *subsidiary corporations;* they are also engaged in sugar refining, which again emphasizes the relation and connection of such receipts with the sugar-refining business of the principal corporation now before the court. And thereupon he invokes certain decisions on the claim that the United States by taxing such receipts is exacting its

excise from these other corporations and not from the stockholder, the Spreckels Company. One of these decisions simply shows that under a law of New York (*People* v. *Albany Insurance Co.*, 92 N. Y., 458) it is not legal to include in a franchise tax measured by dividends for the tax year a large surplus fund earned and acquired before the act went into effect. This case might have been an authority for the decision below adverse to the Government as to earnings made previous to this law but received after its passage, but it is no authority on the point to which it is cited.

Nor is *Bailey* v. *Railroad Co.* (106 U. S., 109) a relevant authority here. That case construed the internal-revenue act of 1864 (13 Stat., 223) in precisely the same way as the New York decision interpreted the law of that State. It can not be maintained that the tax on that portion of the business receipts which is derived from shares of other sugar refining companies is a tax upon those companies. The tax is valid not only as respects receipts from loans and investments from interest-bearing securities, but also as respects dividends from the business of another corporation.

The point about double taxation I submit is untenable. Duplicate taxation is not open to legal objection when it is plainly intended, or when it naturally or unavoidably results from the law. It is too plain for argument that counsel's quotation from Cooley on Taxation contemplates a case where

a particular concrete object of taxation, or identically the same subject of taxation, whether concrete or not, contributes twice to the same burden in one case and not in another of the same class. Here any sugar refiner, individual, firm or corporate, owning such securities would be subject to this portion of the tax. For all it appears, all sugar refiners may be subject to it for this reason. If not, it is merely an accident or incident of this corporation's good fortune, as contrasted with other refiners, that its equipment for and conduct of the business places this slight burden upon it which other refiners not so fortunate do not bear.

It is to be remarked that Cooley also says (pp. 222, 223):

> Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It can not be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances * * * "Property," it is said in one case, "is liable in many cases to be taxed twice. * * * Thus, stock in trade may be taxed to the owner while he may be indebted for

> it to many persons, who may be taxed for those debts or the money loaned to purchase it. Real estate may be taxed to a mortgagor in possession while the mortgagee is taxed for the money secured by the mortgage." * * * "The power to tax twice," it is said in another case, "is as ample as to tax once."

From this it is evident that no valid objection can be urged against this tax on the ground that it is double, which in reality it is not. Certainly, so far as it may be thus considered, that effect is merely indirect, remote, and consequential. This contention is sustained by the following additional authorities: The *Delaware R. R. Tax* (18 Wall., 206); *Farrington* v. *Tennessee* (95 U. S., 679); *Sturges* v. *Carter* (114 U. S., 511); *New Orleans* v. *Houston* (119 U. S., 265); *Patton* v. *Brady* (184 U. S., 608); 1 Desty on Taxation, page 203.

Further, on this point it is not especially significant to say, as counsel does, that there is nothing in this act to rebut the presumption that double taxation was not intended. The act certainly contains nothing to avoid that effect, and if it has really supervened, which is to be doubted, it is more accurate to say that any such collateral result operating equally on all who are similarly placed is natural, is reasonably to be contemplated in such a law, is not unjust, and, as in many other tax laws, is unavoidable.

The suggestion in *Bailey* v. *Railroad Co.* (*supra*) approaching this subject merely is that a tax upon a particular year's earnings or business can not reach back to previous years and accumulated profits, when there is no specific authority to levy any further or additional tax. Here there is no such situation as was presented there, wherein one inquiry was whether the tax rested upon the corporation on account of its net profits or upon the income of the stockholder or bondholder, and the losing contention amounted to the claim that the same tax might be both things in succession, one year a tax upon the income of the corporation, and the next upon the same fund as the income of the individual. After all is said it is clear that in this case, assuming the payment of the sugar-refining tax by the subsidiary corporations and the division of net earnings thereafter, the main corporation now in court would certainly not pay the same tax. Even conceding double taxation for argument's sake, it is infinitesimal, considering the dividend on net earnings of the subsidiary corporation as large in relation to their original tax, and considering the relative small proportion which the dividend would constitute in the main corporation's gross receipts.

The decision of Judge Lowell in *Merchants' Insurance Co.* v. *McCartney* (1 Lowell, 447) is like the other cases cited as holding in chief that profits earned previous to the passage of the act could

not be taxed as annual income. Such profits were capital, and not a dividend out of gains and profits. In this case, again, the distinction which I have just endeavored to point out is to be observed, viz., the difference between the tax (on the one hand) upon net income in gross—that is, in the hands of the corporation, obviously repeated by the same tax on the same income after its division in the hands of stockholders; and, on the other hand, a tax measured by the *gross receipts* of a manufacturing corporation which is only in some measure repeated (and in slight measure, if at all) when the share of the first corporation's *net income*, devolving as dividend upon the other corporate owner, is included in its gross receipts from the same kind of business.

(b) The constitutional question.

The tax is an excise and plainly indirect.

This case is manifestly so clear, and the other cases under argument deal with the question so fully, that I need not discuss it *in extensio*.

Patton v. *Brady* is a very recent authority and reviews definitions and comments adversely on a similar argument against the Government there.

The definitions and the opposing argument in that case shows that a tax upon manufacture or the process of manufacture is an excise and indirect.

The court recognizes that excises, or inland impositions, under which the internal-revenue system belongs, do or may reach the goods or

articles themselves, the sale or license to manufacture or sell, dealings in them and consumption of them, and last in enumeration, but first in the natural order as producing the commodities, the process or business of manufacture. In considering the nature of the tax as an excise, it makes no difference how the manufacturing activities are measured in the imposition of the tax. The measure by gross receipts does not avoid the tax nor make it direct. The law says that the tax shall be paid by every person, etc., "carrying on or doing the business of refining petroleum, * * * or owning or controlling any pipe line," etc.

The court further says in *Patton* v. *Brady* that the excise there upon the specific article, tobacco, all manufactured tobacco and snuff, ~~that~~ "is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use." *A fortiori*, then, a tax which is not upon property at all nor upon all manufacturing or manufacturers, or even all refining and all refiners, but upon a certain variety of refining which produces a single particular article, is not a direct tax. It rests upon an energy rather than upon a thing or the product of a thing.

This is a tax upon the process of production, and in the last analysis is also a tax on consumption. In either aspect it is indirect. It is plain that the ~~evidence~~ incidence shifts.

A brief reference to the scientific view.

The question here is purely constitutional and legal and is eminently practical. (*Nicol* v. *Ames*, 173 U. S., 509.) The economic view could not rule.

But it is perhaps worth while to pursue that point briefly because I think this tax is indirect under the most extreme economical tests.

In early definitions of direct taxes some economists included only taxes on land, while others also included capitation taxes, but never taxes on the profits of money or industry.

Even now, according to political economists, a tax on certain real property is an indirect tax, because its burden may be shifted. (2 Mill's Political Economy, ed. 1864, pp. 429–431; Seligman on Shifting and Incidence of Taxation.) And *per contra* it is said, by certain economists, that various taxes generally regarded as indirect, especially such as rest upon personal industry and the gains of callings, are direct. These two statements show how uncertain the subject is and how the matter shifts with the point of view. (Taxation in American States and Cities, by Professor Ely, pp. 75, 76; Fawcett's Political Economy, p. 477.)

But even the economists would regard as indirect this particular variety of tax upon the gains of a calling, because it rests upon the energies of manufacture and not upon professional receipts or the gains of personal industry.

Justice White, in his dissenting opinion in the income-tax cases, thus refers to the economical distinction:

> These economists teach that the question of whether a tax is direct or indirect, depends not upon whether it is directly upon a person, but upon whether, when so levied, it may be ultimately shifted from the person in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly.

Indeed, it is evident from the opinion of the court in the *Income Tax cases* (157 U. S., 579), as well as from the comments on it in Mr. Justice White's dissenting opinion on the rehearing (158 U. S., 711), that notwithstanding the abstract economical doctrine in this part of the field, the court regards taxes on all business gains, professional earnings, salaries, etc., from which human activity evolves profit or income without invested capital, as excises and indirect taxes. And the same dissenting opinion concedes that the decision of the court therein leaves the "tariff or impost, excise taxation, and the direct and indirect taxes on the *vital energies* of the country" to be levied under the rule of uniformity and not the rule of apportionment.

I suppose the court intended to indicate, as not following the economists regarding the nature of

taxes on personal industry and professional receipts (however the court may have reckoned with certain early scientific conceptions), that all taxes on the vital energies of the country in the legal sense are indirect; that there are no such taxes which are direct. Here, certainly, we have a case which clearly lies outside both the economic and the judicial classification of direct taxes.

The scope and relevancy here of the recent income-tax decisions.

In the recent *Income-Tax Cases* (157 U. S., 429; 158 U. S., 601) the court declared and decided that—

> In the cases referred to in the opinion of the court in this case, beginning with *Hylton* v. *United States* (3 Dall., 171) and ending with *Springer* v. *United States* (102 U. S., 586), taxes on land are conceded to be direct taxes, and in none of them is it determined that a tax on rent or income derived from land is not a tax on land.
>
> A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.
>
> A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States. (Decision on first hearing.)

On the second hearing of that case the decision was that "what was decided in the Hylton case was, then, that a tax on carriages was an excise, and therefore an indirect, tax" (158 U. S., p. 627); that "taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes;" that "taxes on personal property or on the income of personal property are likewise direct taxes."

These cases thus state the net result of all the decisions holding that certain taxes are direct taxes, and therefore must be apportioned, and admit to that category besides the poll tax specified by the Constitution only four taxes, viz, on land, on the income of land, on personal property in general (but not on a specific article of personal property), on the income of personal property.

Various taxes were held to be indirect before the decision of the income-tax cases, viz: In *Hylton* v. *United States* (3 Dall., 171), a tax on carriages; taxes on expense or consumption; in *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), a tax on the receipts or incomes of insurance companies; in *Veazie Bank* v. *Fenno* (8 Wall., 533), a tax on the amount of notes paid out by State banks; in *Scholey* v. *Rew* (23 Wall., 331), succession taxes; in *Springer* v. *United States* (102 U. S., 586), an income tax on individuals. And since the income-tax decision the court has determined that the following taxes are indirect, viz: In *Nicol* v. *Ames* (173 U. S., 509), a stamp tax on sales at exchanges

or boards of trade; in *Knowlton* v. *Moore* (178 U. S., 41), an inheritance tax; in *Patton* v. *Brady* (184 U. S., 608), an internal-revenue tax on tobacco.

The ground was fully traversed by the court in the income tax cases, which were heard twice and argued fully and elaborately by distinguished counsel. It will serve no useful purpose to carry the court over that ground again at length.

In Mr. Edmunds's argument he indicates very clearly the vital distinction. In arguing that the decision in the Hylton case was error, he states that the court with hesitation said that a tax upon carriages fell over into the region of indirect taxes, which, as everybody described them, were those *which are intended to fall upon the movement of commodities and the voluntary occupations of men* (157 U. S., p. 487)—conveyances and sales, for example, and manufacturing operations.

In response to questions from members of the court, Mr. Edmunds stated the distinction again very clearly. In reply to the question of Mr. Justice Harlan whether he had formulated any "general rule by which we are to determine whether a tax is direct or indirect," Mr. Edmunds replied:

> A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his *voluntary calling, pursuit, or acts, as importing*

goods, which he may import or not import as he pleases; not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden i to some degree moved on, but in respect of things that belong to the existence of property as an entity, a state of physical being. * * *

Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately, while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?

Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement. (157 U. S., 491, 492.)

He then argues that the income of a man is inseparable from him, is personal, begins and ends with him, and is therefore direct.

Mr. Choate conceded the court's unwillingness to come to the conclusion that an income tax in all its extent levied upon all callings and earnings was a direct tax. His argument, therefore, was confined to the narrower ground (beyond which, in fact, the decisions do not go), viz, that a tax on the direct necessary income of real estate and personal estate is direct when a tax is on the real estate itself and the rent of it or on the bulk of personal property and the income from it. He did

not speak, he says, of the earnings and income from labor and from any calling, trade, profession, or business. He also refers to the antithesis which invokes not the rule of apportionment, but the rule of uniformity when the taxes "operate as an excise or duty upon income derived from *business or work* of any kind," and speaks of the surrender of the taxation power by the States to Congress as to "the imposts, absolutely; the excise and duties on consumable commodities, to a great extent."

The Chief Justice, delivering the opinion of the court, says (p. 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes. But a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

In the review of the significant decisions the Chief Justice thus characterizes some of them:

> In *Pacific Insurance Co.* v. *Soule*, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise" and came within the decision in Hylton's case. * * * The decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a

> charge for a privilege, or on the transaction of business without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done.

Scholey v. *Rew* was held to be the case of a succession tax which the court said was "'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy." "A succession duty is not a tax upon income or upon property, but upon the actual benefit derived by the individual, determined as prescribed."

The discussion on the Springer case states that the income was not derived in any degree from real estate, but was in part professional and in part interest on Government bonds, and so the tax was held to be an excise or duty, and as such not direct. In noting certain obscurities in the record and opinion in the Springer case, the Chief Justice says:

> A tax on professional receipts might be treated as an excise or duty, and therefore indirect, while a tax on the income of personalty might be held to be direct.

The view of the Chief Justice on all the preceding cases is that they all determined that taxes on land are direct taxes, and that none of them determines that taxes on rents or income derived

from land are not taxes derived from land; and the opinion then proceeds to hold that there is no distinction between a tax on real estate and on the income therefrom.

In Mr. Justice Field's concurring opinion he thus defines direct taxes (p. 588):

> Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense they have sometimes been confined to taxes on real property, including the rents and income derived therefrom.

And the learned justice thus describes excises (p. 592):

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration as applied to [various corporate associations] or to the conduct of any other kind of business are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The court points out and substantially approves the rule as stated by Lord Selbourne in *Attorney-General* v. *Reed* (10 App. cas., 141, 144) [a tax

under an act of Parliament giving provincial legislatures the power of direct taxation, under which power a stamp duty was laid by a Quebec legislature], viz, "The question whether it is a direct or an indirect tax can not depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the *ultimate incidence is uncertain*, then, as it appears to their lordships, it can not, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question."

The extent of the income-tax decision is indicated in the following passage (p. 635):

> We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on *gains or profits from business, privileges, or employments*, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

The authorities which may be invoked to support the argument that a tax on an incident or function of property is a direct tax upon the property itself, which have been recognized in respect to income from property, are *Brown* v. *Maryland* (12 Wheat., 419, 444) and *Weston* v. *Charleston* (2 Pet., 449). They simply show that

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the States on the one hand can not in any form, directly or indirectly, burden the exercise by Congress of the powers committed to it by the Constitution, and on the other hand can not in any form, directly or indirectly, burden the agencies or instrumentalities employed by the States in the exercise of their powers.

Similarly, in the *Fairbank case* (181 U. S., 283) a tax on a document was held to be under all the circumstances a tax on an export, and the constitutional prohibition in that matter is positive and complete.

Such cases involve the question "whether under the Constitution, if no power existed to tax at all, either directly or indirectly, an *indirect* tax would be unconstitutional." (Mr. Justice White in Income Tax Cases, 158 U. S., 646.)

Opposing counsel grants that as long as the tax is not imposed upon the *rem*, but is required to be paid as a condition or in consideration of a business or privilege, it is an excise tax. He proceeds, however, to argue that Congress is not at liberty to label a direct tax as an excise tax if the assessment is really upon the *rem*, and that the tax here is in fact upon the *rem*. In developing this argument he asks the question, In what respect does a tax upon the receipts from the sale of a thing differ from the thing sold? and gives various illustrations seeking to show that this tax rests upon the *rem* and is therefore unconstitutional.

I do not think I need repeat the argument upon this point. The answer to counsel's question is: In the first place, that even a tax upon the particular thing sold, being just one article of personal property, viz, sugar, "the physical thing," would *not* be a direct tax within the constitutional sense; and in the second place, that a tax upon the sale would not be a tax upon the thing sold; and lastly, that the tax in this case is not even upon the sale as a transaction, which would be indirect, and has often been so held, but is upon the activities and energies involved, the *business* of sugar refining—upon the entire business enterprise, beginning with the initial steps of assembling the raw material, through the particular manufacturing process which refining is, to sale as the ultimate stage of the series.

But whether we look at this larger and integral import of the question, I submit that the tax is constitutional; or whether we regard only the receipts from wharfage, interest and dividends, the tax can not be construed to rest upon wharves, moneys and shares as *res*, and is just as clearly constitutional.

III.

CONCLUSION.

There can be no valid doubt of the right of Congress to select this subject for taxation, of its right so to classify that those "carrying on or doing the business of" refining sugar, whose

gross annual receipts exceed $250,000, shall be subject to pay annually this special excise tax. There can be no doubt that in laying this excise Congress observed the rule of uniformity as held to mean a territorial or geographical uniformity, and, indeed, even the intrinsic uniformity, the "equality of right among all the taxpayers of the same class" which that rule has sometimes been claimed to intend.

I suppose it is true that one ground of the recent income-tax decisions was that incomes in general exist everywhere, and that a tax thereon is therefore fairly apportionable. But can it possibly be contended that the framers of the Constitution meant to subject to the rule of apportionment property or other subjects of taxation, concrete existences or operations, which were absolutely nonexistent in many States? In how many States of this Union is the business of sugar refining carried on? Not many, indeed. The Internal Revenue Bureau report that in only eight States are there any persons, firms, corporations, or companies carrying on this business, viz: New York, New Jersey, Pennsylvania, Massachusetts, California, Louisiana, Montana, and Texas.

The beet-sugar manufacturers were held not to be liable to the tax, on the ground that they were sugar producers and not sugar refiners; that they did not purchase raw sugars for the purpose of refining them, but made sugar directly from the

beets by a continuous process, and there was no refining except as part of this continuous process of manufacture. (T. D., 19831.)

The economic tests which this court has little regarded, or has rejected, may tend to include in direct taxes all those which, however laid, ultimately rest upon persons or property, and can not be shifted, including, besides a land tax and a tax on personal property in general, or on income in general, excises upon specific articles and even upon the receipts from labor and professional and other callings. But this tax even the speculative economists would hold to be indirect because its incidence can be shifted. The operation of the business, the manufacturing industry, is taxed, but the product thereof is sold by the same manufacturer, and in its sale the tax finds a lodgment and is paid by the consumer.

I therefore summarize the Government contentions as follows:

That by and under its charter, and in fact, the plaintiff in error is refining sugar, involving related purposes which the charter defines;

That the tax on interest, wharfage, and rent affecting the results of the business of sugar refining, which are naturally and fairly incidental thereto and a part thereof, was justly laid;

That the tax is distinctly an excise and indirect, and, so considered, it is uniform;

That the tax can not be viewed as direct under the decisions of this court or under any authorities,

judicial or economic, (*a*) because it does not fall upon persons or property or incomes, except in the most remote and indirect sense; (*b*) because it falls upon a calling or occupation or the gains therefrom; (*c*) because it really operates upon the *operation* of an industry, the *exercise* of a right, the *use* of property, upon the business energies or activities; (*d*) because the incidence of the tax can be, and surely is, shifted and passed on, and, while immediately paid by the refiner, is ultimately paid by the consumer.

I submit that the judgment below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,
v.
PENROSE A. MCCLAIN, COLLECTOR OF internal revenue for the first district of Pennsylvania.
} No. 103.

BRIEF IN REPLY ON QUESTION OF JURISDICTION.

In view of the discussion at the bar elicited by the questions of the court with reference to its jurisdiction of the case, the Government deems it appropriate to submit some further observations thereon.

I.

Whether the views suggested in the Government brief are correct or not, it would seem that this court has no jurisdiction of the case, and that the writ of error must be dismissed.

If, as heretofore contended, the circuit court of appeals *had* jurisdiction, the case having arisen under the revenue laws, the plaintiff in error having chosen that procedure, but that court having

passed upon the entire case, without certifying the constitutional question, and no petition for a writ of certiorari having been submitted, more than a year having elapsed, it follows that, for the reasons already stated, the case is not properly here, and a dismissal must follow.

II.

If, on the other hand, as suggested in the discussion at the bar, the circuit court of appeals did *not* have jurisdiction, the Government contends that the present writ of error must nevertheless be dismissed. It appears from the transcript of the record (pp. 3–6) that the suit was one which did "really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution" (*American Sugar Refining Co.* v. *New Orleans*, 181 U. S., 281), for in the "Statement of the Plaintiff's Demand" it is claimed:

First. "That the said law, in so far as it assumes to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax, is unconstitutional and void."

Second. "That the said tax is a direct tax which has not been apportioned among the several States as required by the Constitution of the United States, and is not uniform throughout the United States, and is invalid."

The suit was brought by the Spreckels Sugar Refining Company, "a corporation organized and

existing under and by virtue of the laws of the State of Pennsylvania, engaged in the business of manufacturing sugar; and the defendant was, at the various times hereinafter mentioned, the collector of internal revenue for the first district of Pennsylvania." (Rec., pp. 2, 5.) The jurisdiction of the circuit court of the United States over the case, therefore, rested solely on the ground that the suit arose under the Constitution and laws of the United States. (Act of August 13, 1888, 25 Stats., 434.) It was a claim for the refund of taxes assessed and collected under a statute of the United States, which statute it was asserted was unconstitutional and void. As the constitutional question appeared on the face of the first pleading in the case, the appellate jurisdiction of this court under section 5 of the act of March 3, 1891, establishing circuit courts of appeals, was exclusive.

In the case of *American Sugar Refining Co.* v. *New Orleans* (*supra*), the Chief Justice, referring to the circuit court of appeals act, said:

> The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final, it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

> And the right to two appeals would exist in *every case* (the litigated matter having the requisite value) where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit court of appeals, for their decisions would not come within the category of those made final.
>
> As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law or treaty of the United States (*Gold Washing and Water Co.* v. *Keyes*, 96 U. S., 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S., 571; *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company*, 178 U. S., 239) and as those cases fall strictly within the terms of section five, the *appellate jurisdiction of this court in respect of them is exclusive.*

Also, in the case of the *Huguley Mfg. Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295), the Chief Justice, speaking for the court, said:

> If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive.

The writ of error here having been sued out to review not the judgment of the circuit court, but the judgment of the circuit court of appeals, it follows that this court has no jurisdiction and the writ must be dismissed. To give this court jurisdiction the writ of error should have been sued out under section 5 of the circuit court of appeals act direct from this court to review the judgment of the circuit court.

In the case of *Cary Manufacturing Co.* v. *Acme Flexible Clasp Co.* (187 U. S., 428) the Chief Justice, speaking for the court, said:

> It is settled that even if a party might be entitled to come directly to this court under that section [5], yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court.

III.

Opposing counsel admits that if the case is one arising solely under the revenue laws, the writ of error can not be sustained; but he also contends that the jurisdiction of the circuit court was invoked (1) because of a constitutional question, and (2) because of a question arising under the revenue laws. Because the case involved a question arising under the revenue laws, it appears to be contended that there was a right, under section 6 of the act of March 3, 1891, to a review by the circuit court of appeals; and that because the jurisdiction of the circuit court rested also upon a

constitutional question, that that question, although arising in a revenue case, was not final in the circuit court of appeals, but is reviewable here. It would follow, therefore, that in "all cases arising under * * * the revenue laws," which involved constitutional questions, Congress provided two methods and two forums for a review of such cases. Either such a case might be taken direct to the Supreme Court from the circuit court, under section 5, or to the circuit court of appeals, under section 6, with a further right of appeal to this court. But, as heretofore shown, this court has held in *American Sugar Refining Co.* v. *New Orleans* (181 U. S., 281) and *Huguley Manufacturing Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295) that the appellate jurisdiction of this court is exclusive when the constitutional question appears from the plaintiff's own statement, as it does in this case. As is shown in the former case, the right to two appeals (clearly not tenable) would exist in every case "where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit court of appeals."

It is submitted that there are no separate grounds of jurisdiction in the present case, because of a constitutional question, and of a question arising under a revenue law, but that the case is one which clearly arose solely under the "Constitution or

laws of the United States." (Act of August 13, 1888, 25 Stat., 434.)

IV.

It was suggested at the hearing that even if the circuit court of appeals had jurisdiction to review a case involving a constitutional question fairly raised in the initial pleading, which case, because of the constitutional question involved, would be subject to review by this court, nevertheless the judgment in the present case is not such a final judgment as may be reviewed here. The circuit court of appeals on the writ of error from that court reversed the judgment of the circuit court "solely upon the ground that the circuit court erred in holding that the plaintiff was required to pay the tax in question otherwise than annually." The circuit court of appeals therefore reversed and remanded the case "to the said circuit court for further proceedings in conformity with the opinion of this [that] court." The judgment of the circuit court of appeals is not final in form, but requires something further to be done by the circuit court.

The claim of the plaintiff in error, *inter alia*, was for interest upon the several amounts paid by him to the collector of internal revenue monthly between October 11, 1898, and March 23, 1900. (Rec., p. 4.) The circuit court held that the payments were properly made monthly, and entered judgment on the special verdict for the amount of

tax paid on business done before the passage of the act, and for stevedoring, "with the proper interest on both sums," amounting to $1,056.82. The case was remanded, therefore, to the circuit court in order that the amount of interest due under the judgment of the circuit court, modified in accordance with the opinion of the circuit court of appeals, might be ascertained.

In the case of *Keystone Iron Co.* v. *Martin* (132 U. S., 91, 93), the rule is laid down that a decree to be final must "dispose of the entire controversy between the parties," and the principal cases are collected in which decrees were held not appealable, because not final.

In the case of *Bostwick* v. *Brinkerhoff* (106 U. S., 3), Mr. Chief Justice Waite stated the principle as follows:

> The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.

It is obvious that the circuit court in the present case could not execute the judgment already ren-

dered by it should the judgment of the circuit court of appeals be affirmed by this court. It is submitted, therefore, that the judgment was not final, and for that reason not reviewable here, and that the writ of error should be dismissed.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 103.—October Term, 1903.

Spreckels Sugar Refining Company, Plaintiff in Error,
vs.
Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania.

In error to the United States Circuit Court of Appeals for the Third Circuit.

[February 23d 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

The plaintiff in error, who was the plaintiff below, is a sugar refining company, incorporated under the statutes of Pennsylvania for the purpose "of refining sugar, which will involve the buying of the raw material therefor, and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining."

The defendant is the Collector of Internal Revenue for the First District of that Commonwealth.

The plaintiff seeks by two separate actions to recover certain sums, paid paid by it under protest to the defendant as Collector, and which it is alleged were unlawfully exacted by that officer under the 27th section of the act of June 30th 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes;" by which act a tax was imposed upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation or company carrying on or doing the business of refining sugar—the amount of the tax to be determined by the returns of business required by the statute. 30 *Stat.* 448, 464, *c.* 448.

By agreement of the parties, the issues in the two causes were consolidated and tried as one cause.

It is conceded that before bringing the actions the plaintiff did all that was required in order to maintain a suit against the Collector, and that the payments made by it to that officer were not voluntary.

The record contains a summary of the returns made by the plaintiff covering its entire gross receipts from June 14th 1898 to August 1st 1900, under these heads: Period covered by return; Indebtedness due before June 14th 1898; Amounts received from interest, rent and wharfage, and

stevedoring; Sugar sold since June 14th 1898; Gross receipts; Amount of tax paid; and Dates of payment."

The plaintiff contended that for the purposes of the tax in question certain things were included, as being part of its gross annual receipts arising from business, which could not properly have been so included, and that no tax could legally have been exacted on account of them. The Government insisted that no taxes had been exacted which the law did not require to be paid.

In its Statement of Demand the plaintiff alleges that no part of its receipts from other sources than the business of refining sugar was taxable under the provisions of the act; that no tax upon receipts was payable or collectible before the end of the year from the date of the passage of the act; that the administration of the act makes arbitrary, unjust and illegal discrimination, founded on a pretended difference between the business of manufacturing and of refining sugar, between the plaintiff and other persons, firms, corporations and companies carrying on and doing the business of refining sugar; and that all the provisions of the act subjecting the plaintiff to pay the tax in question were in violation of the Constitution of the United States and void.

That statement also shows that upon appeal to the Commissioner of Internal Revenue, it urged the following reasons why the sums it had paid should be refunded: That the act, so far as it assumed to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax, was unconstitutional and void; that the tax was a direct tax, which had not been apportioned among the several States as required by the Constitution, was not uniform throughout the United States, and was invalid; that the plaintiff was and at all times had been engaged in the business of manufacturing and not in that of refining sugar; that it refines sugar only incidentally in the process of manufacture, and is, therefore, not liable for the payment of the tax; that by the provisions of the act the tax was payable annually at the end of each year and the collection thereof monthly or for periods less than a year and prior to the expiration of the year was illegal, unauthorized and void; and that the tax was assessed upon and collected from gross receipts that included receipts outside of those coming from the business of refining sugar; that such gross receipts included receipts from sales of sugar made prior to the passage of the act, from interest on loans and indebtedness, from dividends upon stock owned by the plaintiff in other sugar refining companies, from wharfage collected by it upon wharves owned by it, and from receipts from other sources.

One of the contentions of the plaintiff was that apart from its constitutionality, the act of 1898, properly construed, did not embrace the claims here in dispute, and therefore did not authorize the defendant to demand and collect the taxes here in question.

The cause was determined in the Circuit Court upon an agreed special verdict of a jury. Some of the positions taken by the plaintiff were sustained while others were overruled. Judgment was rendered in favor of the plaintiff for $1,056.82, the aggregate of the sums paid (with interest thereon) by way of tax upon receipts on business done before the passage of the act, and for stevedoring. 109 *Fed. Rep.* 76. The plaintiff prosecuted a writ of error to the Circuit Court of Appeals, which sustained the judgment, except in one particular, namely, in requiring the plaintiff to pay the tax in question otherwise than annually. 113 *Fed. Rep.* 244. And the case is here upon writ of error sued out by the plaintiff.

It may be stated that both courts below formally sustained the constitutionality of the act of 1898, remitting that question to this court for full consideration and determination.

We are met at the threshold of this case with a question of jurisdiction raised by the Government, which contends that under the existing statutes the judgment of the Circuit Court of Appeals cannot be reviewed by this court, at the instance of the plaintiff, as of right.

By the 5th section of the Judiciary Act of March 3d 1891, appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to this court in certain specified cases, among which is "any case that involves the construction or application of the Constitution of the United States," and "any case in which the constitutionality of any law of the United States. . . is drawn in question." § 5.

By the 6th section of the same act it is provided that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error [the] final decision in the District and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, except that in every subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any question or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction in the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for consideration, and thereupon shall de-

cide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal, and accepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 *Stat.* 826, *c.* 517.

This suit was cognizable by the Circuit Court under the Judiciary Act of 1887–8, as one arising under both the Constitution and the laws of the United States. 25 *Stat.* 433, *c.* 866. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its Statement of Demand, has its sanction in that instrument, if it be true, as alleged, that the act of 1898, under which the defendant proceeded, when collecting the taxes in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue. By section 629, subdivision 4, of the Revised Statutes, the Circuit Courts, without regard to the citizenship of the parties, may take original cognizance of suits arising under a law of that character. That provision has not been superseded by the Judiciary Act of 1887–8. See also *R. S.* §§ 3220, 3226.

Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's Statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. *Huguley Mfg. Co* v. *Galeton Cotton Mills*, 184 *U. S.* 291, 295. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the *construction* of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the 5th section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although if

the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court, or, at its election, to go to the Circuit Court of Appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the Circuit Court to this court. *Robinson* v. *Caldwell*, 165 *U. S.* 659; *Loeb* v. *Columbia Township Trustees*, 179 *U. S.* 472; *Ayres* v. *Polsdorfer*, 187 *U. S.* 585.

It remains to inquire whether the judgment of the Circuit Court of Appeals was so far final, within the meaning of the 6th section of the act of 1891, that it could not be reviewed here as of right upon writ of error. Can the judgment of that court in this case be re-examined here in any way except upon writ of certiorari granted by this court? The Government insists that it cannot, because the case—to use the words of the 6th section of the act of 1891—is one "arising . . under the revenue laws." So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the Government on this point cannot be sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words "arising . . under the revenue laws," in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the 5th section of that act. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws, and involving a *construction* of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the Circuit Court of Appeal to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution, or upon the constitutionality of any act of Congress drawn in question.

What we have said is in harmony with our former decisions, although the precise point here was not involved in any of them. In *American Sugar Company* v. *New Orleans*, 181 *U. S.* 277, 280, 281, it was said: "It was held in *Loeb* v. *Columbia Township Trustees*, 179 *U. S.* 472, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the State statute involved was claimed in defense to be in contravention of the Consti-

tution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court. . . If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and *also on grounds independent of that,* a question expressly reserved in *Colorado Central Mining Company* v. *Turck,* 150 *U. S.* 138, and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment, (and the power to certify assumes the power to decide,) an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. *Union Pacific Railway Company* v. *Harris,* 158 *U. S.* 326." In *Huguley Manufacturing Company* v. *Galveston Cotton Mills,* 184 *U. S.* 290, 295, it was said: "If after the jurisdiction of the Circuit Court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court; although it may be carried to the Circuit Court of Appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb* v. *Columbia Trustees,* 179 *U. S.* 472. If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and *also on grounds independent of that,* then if carried to the Court of Appeals the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Company* v. *New Orleans,* 181 *U. S.* 277." "The ground on which the jurisdiction of the Circuit Court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the Circuit Court of Appeals cannot be regarded otherwise than as made final by the statute."

Now, as the judgment of the Circuit Court of Appeals may be brought to this court, as of right, where the jurisdiction of the Circuit Court rested upon the diversity of citizenship, and also upon grounds that would bring the case within section 5 of the act of 1891, it must be held that the judgment of the Circuit Court of Appeals is not final, within the meaning of the 6th section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the Constitution or the constitutionality of an act of Congress.

For the reasons stated we hold that the plaintiff was entitled, of right, to a writ of error for the review by this court of the judgment of the Circuit Court of Appeals.

Coming now to the merits of the case, we first notice the contention of the plaintiff that the 27th section of the act of 1898 imposes a direct tax in violation of the constitutional provision relating to the apportionment of taxes of that kind among the several States.

The above section of the act of 1898 is as follows: "Sec. 27. That every person, firm, corporation or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars. And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for such failure or refusal to make return as aforesaid and for each and every false or fraudulent return."

The contention of the Government is that the tax is not a direct tax, but only an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. *Art.* 1, § 8. Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as "a special excise tax," and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises.

This general question has been considered in so many cases heretofore decided that we do not deem it necessary to consider it anew upon principle. It was held in *Pacific Insurance Co.* v. *Soule*, 7 *Wall.* 433, that the income tax imposed by the internal revenue act of June 30th 1864, amended July 13th 1866, 13 *Stat.* 276, 14 *Stat.* 98, on the amounts insured, renewed

and continued by insurance companies, on the gross amount of premiums received, on dividends, undistributed sums and income, was not a direct tax, but an excise duty or tax within the meaning of the Constitution; in *Veazie Bank* v. *Fenno*, 8 *Wall.* 533, that the statute then before the court, which required national banking associations, State banks or State banking associations to pay a tax of ten per centum on the amount of State bank notes paid out by them, after a named date, did not in the sense of the Constitution] impose a direct tax, but was to be classed under the head of duties, which were to be sustained upon the principles announced in *Pacific Insurance Co.* v. *Soule*, above, cited; in *Scholey* v. *Rew*, 23 *Wall.* 331, that the tax imposed on every devolution of title to real estate was not a direct tax but an impost or excise, and was, therefore, constitutional; in *Nicol* v. *Ames*, 173 *U. S.* 509, that the tax imposed (30 *Stat.* 448) upon each sale or agreement to sell any products or merchandise at an exchange, or board of trade, or other similar place, either for present or future delivery, was not in the constitutional sense a direct tax upon the business itself, but in effect "a duty or excise law upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act," which was "separate and apart from the business itself;" in *Knowlton* v. *Moore*, 178 *U. S.* 41, 81, that an inheritance or succession tax was not a direct tax on property, as ordinarily understood, but an excise levied on the transmission or receipt of property occasioned by death; and, in *Patton* v. *Brady*, 184 *U. S.* 609, that the tax imposed by the act of June 13th 1898, upon tobacco, however prepared, manufactured and sold, for consumption or sale, was not a direct tax, but an excise tax which Congress could impose; that it was not "a tax upon property as such but upon certain kinds of property, having reference to their origin and intended use."

In view of these and other decided cases, we cannot hold that the tax imposed on the plaintiff expressly with reference to its "carrying on or doing the business of . . refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the act of Congress, a special excise tax, and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers.

It is said that if regard be had to the decision in the *Income Tax Cases*, a different conclusion from that just stated must be reached. On the contrary, the precise question here was not intended to be decided in those cases. For, in the opinion on the rehearing of the *Income Tax* cases the Chief Justice said: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such." 158 *U. S.* 601.

The question of the constitutionality of the act having been disposed of, we turn our attention to the questions involving its construction merely.

As already stated, the judgment of the Circuit Court determined certain questions for the plaintiff. But as the Government did not prosecute a writ of error to the Circuit Court of Appeals those questions cannot be examined here, and we can only consider such points, on the merits of the case, as are raised by the plaintiff's assignments of error.

It was in proof that the plaintiff owned three wharves on the Delaware River, at which vessels landed, and for the use of which those vessels paid wharfage according to the rates prescribed by a general tariff. A large part, nearly all, of the sugar refined by the plaintiff was brought into the Port of Philadelphia by vessels which come to those wharves, and such vessels paid wharfage according to that tariff. Many vessels brought raw sugar which the Refining Company had purchased abroad. The wharves were built by the plaintiff for the purpose of transacting any business that it might have or for which it saw fit to use them. And nearly all the business done at that time at the wharves was the unloading of sugar consigned to the plaintiff. The exceptions were too few to be regarded as material. Upon its receipts from such wharfage, the plaintiff had been compelled to pay a tax. Was it required by the act to pay a tax upon receipts of profits from that source? In other words, were the receipts from wharfage properly included in plaintiff's gross annual receipts upon which the amount of the prescribed tax was to be computed?

On this question the Circuit Court said: "Scarcely any vessels lie at those wharves except the vessels that bring raw sugar to the plaintiff, and the wharves are used for the convenience and greater profit of the corporate enterprise. The money paid by the vessels for wharfage is, I think, a receipt for the business." The view of the Circuit Court of Appeals was thus expressed: "The use which the plaintiff really made of its wharves was in 'carrying on or doing the business of . . refining sugar.' They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were

its receipts, and as such they were properly comprised in the assessment. *Adams Express Company* v. *Ohio State Auditor*, 165 *U. S.* 194."

This question is not wholly free from difficulty. But we think the better reason is with the ruling in the Circuit Court and in the Circuit Court of Appeals, to the effect that the wharves, in every substantial sense, constituted a part of the plaintiff's "plant" and, if not absolutely necessary, were of great value, in the prosecution of its business; and that receipts derived by plaintiff from the use of the wharves by vessels—particularly because, with rare exceptions, the vessels using them brought to the plaintiff the raw sugar which it refined—were receipts in its business of refining sugar. The primary use of the wharves was in connection with and in the prosecution of that business. The importation of raw sugar from abroad was not, in any proper sense, a separate business, but an essential part of the plaintiff's general business of refining sugar. The wharves were part of the instrumentalities and conveniences employed by plaintiff for the successful management and conduct of its business of refining sugar. Without the wharves the gross amount of receipts and profits from such business would probably have been less than they were in fact. If the receipts from the use of the wharves were reasonably to be deemed receipts in the plaintiff's business of refining sugar, as we think they were, then they were properly treated as a part of its gross annual receipts, upon which, in excess of the sum of $250,000, the tax in question was rightly imposed.

The remaining assignment of error relates to the including in the plaintiff's gross annual receipts of interest paid to it upon deposits in bank and dividends received by it upon shares of stock in other companies. Upon this point Judge McPherson, holding the Circuit Court, said: "This interest, I think, was properly included by the Collector in determining the annual value of the business. It was corporate property, presumably used for corporation purposes, and was as much engaged in the business of refining as the capital invested in machinery or raw materials." Judge Dallas, with whom concurred Judge Acheson, delivering the judgment of the Circuit Court of Appeals, said: "The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income producing securities, was also rightly included. The special verdict states that it was 'interest upon its investments of moneys and property as explained by the testimony of Mr. Ball,' and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining, but the question for our decision is, not whether this interest was derived from the refining of sugar, which of course it was not, but

whether or not it was received in the *business* of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation, however occasioned, must have been its gain. Except in connection with and as incidental to that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business." Judge Gray, dissenting, said: "Keeping in mind the well settled rule, that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds are in any proper sense receipts in the business of sugar refining. The very term 'gross receipts' in 'the business,' would seem to exclude all such receipts as the interest upon investments here referred to."

We are of opinion that upon the point last stated there was error. The gross annual receipts, upon which, in excess of a certain amount, the tax was imposed, were, under the statute, only receipts in the business of refining sugar, not receipts from independent sources. But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration or the receipt of dividends on such stocks were wholly apart from the particular business in which the holder of the stock was engaged.

We hold that in the matter of interest received by the plaintiff on de-

posits in bank, as well as in the matter of dividends received by it on stocks in other companies, the judgments of both the Circuit Court and the Circuit Court of Appeals were erroneous.

The judgment of each court is reversed and the cause is remanded for such further proceedings as may be necessary for the correction of the errors hereinbefore specified, and as may be in conformity with this opinion.

It is so ordered.

The CHIEF JUSTICE: Mr. Justice BROWN and myself are of opinion that the judgment of the Circuit Court of Appeals in this case was made final in that court by the Judiciary Act of March 3, 1891, and that, therefore, the writ of error should be dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.